CHARLES DEVENS

AMERICAN BAR ASSOCIATION JOVRNAL

AUGUST - 1944

CHISELED IN CHESTNUT BY THAT OLD CHESTNUT VENDOR, HYPHEN SMITH

THIS is the story of *Hollister Hart
Who signed the bond of his Cousin *Art
So Art could take on the job he had won
By plenty of votes in an election.

Art found the pay the best he had made,
But his living costs too went on the upgrade,
And first thing he knew he needed cash badly,
And now we relate, and relate rather sadly,
That he dipped in the till and used some dough
And brought to the Harts both heartaches and woe.

Art's art in hiding his secret borrowings
Just greatly increased the family sorrowings.
Art's wife felt disgraced, as you may have guessed,
While Hollister's family was dispossessed,
For Hollister had to make up the shortage,
And it was too big to be met with a mortgage.

They all of them suffered for quite a long time
Though Art was the only one guilty of crime.
Now all of this happened a few decades back
When all bonds were signed by persons with jack.

A man here and there still does abscond
But children don't suffer because of a bond
Their papa had signed for some miserable wretch
Who deserved to serve a considerable stretch.

Today bonds are signed by strong corporations
Instead of good friends or trusting relations.

*These names are purely fictitious and any resemblance to those of persons living or dead is purely coincidental

THE TRAVELERS INDEMNITY COMPANY

Fidelity and Surety Bonds

HARTFORD, CONNECTICUT

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There is . . . "a time to laugh" . . .

Ecclesiastes 3:4

The Red Cross mobile blood donor unit was at Speed, Ind., recently. In a group of donors was a strapping fellow. After he had given his pint, the nurse asked if he wouldn't like to sign up to give some more—meaning in a couple of months.

"Sure," he said, as he got back in line.

Mrs. Clancy was returning from shopping and, with the crush and the higher prices, she was in no pleasant humor. As she approached the door she saw Mrs. Murphy, who occupied the street floor, sitting at her window.

"I say, Mrs. Murphy," she called out in deep sarcasm, "why don't ye take your ugly mug out of the windy an' put your pet monkey in its place? That'd give the neighbors a change they'd like."

Mrs. Murphy was ready for her.

"Well, now, Mrs. Clancy," she retorted, "It was only this mornin' that I did that very thing, an' the policeman came along an' when he saw the monkey he bowed and shmiled an' said: 'Why, Mrs. Clancy, when did ye move downstairs?' "

In war or peace, Yankee enterprise follows the American flag. Witness the following letter recently received by a Detroit man from his soldier son stationed somewhere in Australia.

"Dear dad," runs the epistle, "I'm thinking about settling down here after the war and going into business. I'm planning on crossing kangaroos with raccoons and raising fur coats with pockets."

An elderly preacher was stationed in a section of the deep South where his parishioners didn't have much money for his salary. They did help his budget though, by inviting him out to dinner. One Sunday he would eat with the Browns, another, with the Smiths, etc. As his presence would make these meals something of an occasion, there would always be chicken on the table—fried chicken, roast chicken, chicken and dumplings, all kinds of chicken.

It so happened after years of these chicken dinners the old pastor went fishing one day and, while on the outing, he lost his balance and dropped his false teeth in a creek. The clay-colored water quickly covered them and they were lost to his sight.

Studying the situation a moment, the preacher reached into his lunch-box, took out a chicken bone and tied it to his fishing line. As the bone dropped below the water level, the false teeth sprang from the creek bottom and clamped firmly on it. The preacher then hauled them out with ease.

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IN THIS ISSUE

Our Cover—Our historian, George R. Farnum, sketches in his usual brilliant style, the life of Charles Devens, whose portrait appears on the cover of this issue. Devens, upon learning of the outbreak of the Civil War, went directly from the court house, where he was engaged in the trial of a case, to the armory and offered his services to his country. He rose to the rank of Major General and proved himself "the essential type of the citizen soldier and the soldier gentleman."

Returning to his native state of Massachusetts at the end of the war, he was appointed to the Superior Court and six years later to the Supreme Judicial Court. Of his record, Justice Bradley said: "His professional exhibitions in the Supreme Court were characterized by sound learning, chastely and accurately expressed, great breadth of view, the seizing of strong points and disregard of minute ones, marked deference for the court, and courtesy to his opponents."

International Justice According to Law—The address of President Joseph W. Henderson, of Philadelphia, at the third annual meeting of the Inter-American Bar Association in Mexico City, July 31 to August 7, is timely and will be helpful in the consideration of this all-important topic. Editorial comment on President Henderson's address will be found on page 460.

Jefferson and Judicial Review—C. Perry Patterson, eminent author of innumerable articles on American government, citizenship, and political science, gives us his critical interpretation of the part played by Thomas Jefferson in the framing of the Constitution. Professor Patterson's treatise on this important subject is historically interesting and reflects painstaking research. Jefferson said, one hundred and fifty years ago, "The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period." If Jefferson were here now, would he have reason for changing his statement? Read the result of Professor Patterson's study, and decide for yourself.

National Sovereignty and International Organization—John K. Ruckelshaus wrote his thought-provoking dissertation on "National Sovereignty and International Organization" as a result of some of the discussions he has had with other members of the profession in Indianapolis. We welcome the results of such conclusions. The citizen of today is a thinking man—and today he is thinking about the Peace, and about America's international problems after the war. Today's citizen will turn to the legal profession for the answers to his questions. The legal profession must be prepared to answer him.

ANNUAL TOPICAL INDEX

In Volume 62 of the American Bar Association Reports there was printed a complete index of subjects dealt with in the first 23 volumes of the JOURNAL. In Volume 65 of the Reports and subsequent volumes, topical indexes of Volume XXIV of the JOURNAL and of each succeeding volume, have been printed. Reprints are available at $1 each of the topical index of the first 23 volumes.

Joint Trespasses on Patent Property—by Russell Wiles of the Chicago Bar, should be extremely interesting to members of the Bar specializing in patent law, and we feel it will be interesting also to lawyers generally as it relates to a recent Supreme Court decision which might possibly be extended to property other than patents.

Recent Supreme Court Decisions—*Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, a five-to-four decision, is an illustration of inherent judicial power to regulate procedure. Here, instead of remanding a case to the District Court, the Supreme Court directs the Court of Appeals to vacate its judgment because the fraud which the majority of the Court found was perpetrated upon the Patent Office was also perpetrated on the Court of Appeals.

The Supreme Court also held that the statutory remedy by bill of review was not exclusive and did not forestall other remedies.

In *Feldman* v. *United States* it was held that immunity against self-incrimination granted by the Constitution did not prevent proof in a criminal prosecution, of incriminating testimony given by accused in a state court.

DeCastro v. *Board of Commissioners* and *Mario Mercado e Hijos* v. *Commins:* In these two cases the Supreme Court evinced its anxiety that appeals involving questions of local law in Puerto Rico should be assured full judicial review.

In *Baumgartner* v. *U. S.*, the Supreme Court reiterated its decision that in a proceeding to set aside a naturalization certificate because of alleged fraud and illegal procurement, the evidence must be so "clear, unequivocal and convincing" as not to leave the issue in doubt.

No. 4 *in a series of messages presenting facts requested by Individual and Corporate Trustees regarding the*

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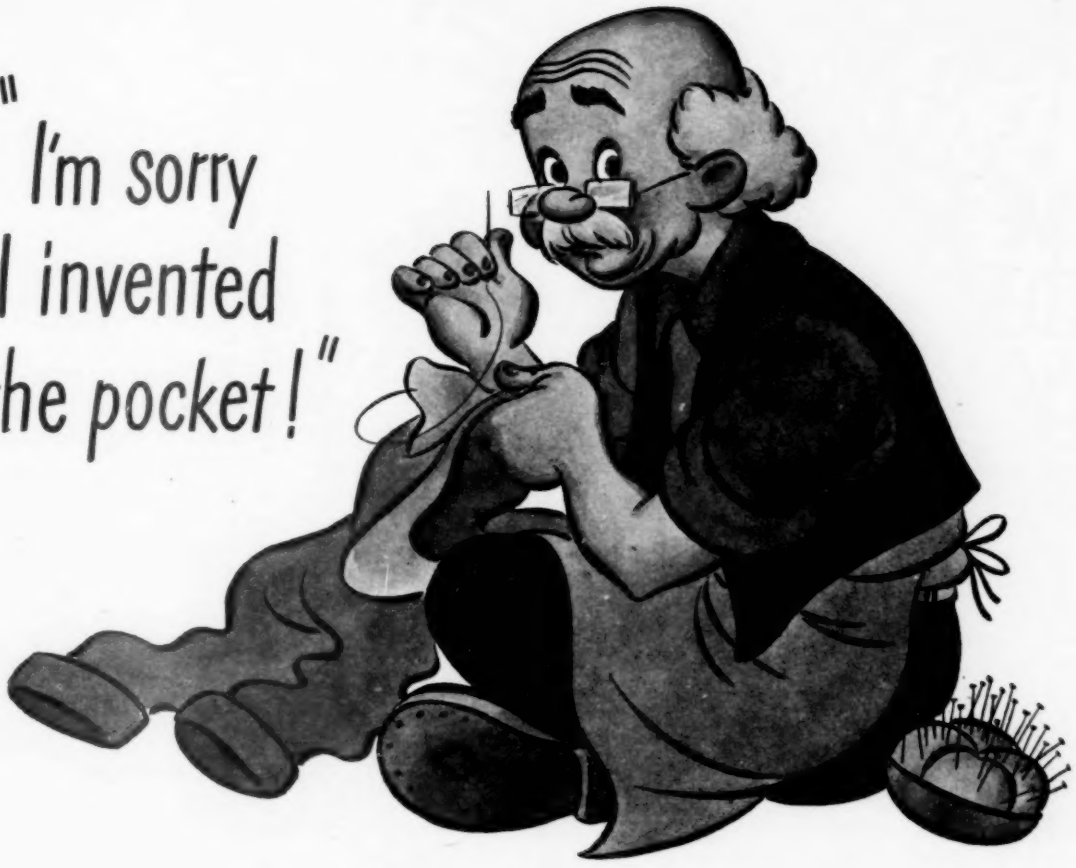
"I'm sorry I invented the pocket!"



IF I HAD KNOWN that some Americans would be using pockets to hold all the extra money they're making these days I never would have invented them.

POCKETS ARE GOOD places to keep hands warm.

Pockets are good places to hold keys... and loose change for carfare and newspapers.

But pockets are no place for *any* kind of money except actual expense money these days.

The place—the *only* place—for money above living expenses is in War Bonds.

Bonds buy bullets for soldiers.

Bonds buy security for your old age.

Bonds buy education for your kids.

Bonds buy things you'll need later—that you can't buy now.

Bonds buy peace of mind—knowing that your money is in the fight.

Reach into the pocket I invented. Take out all that extra cash. Invest it in interest-bearing War Bonds.

You'll make me very happy if you do.

You'll be happy too.

WAR BONDS to Have and to Hold

INTERNATIONAL JUSTICE ACCORDING TO LAW

By JOSEPH W. HENDERSON
President of the American Bar Association

IT is my happy privilege to bring to the delegates present at this Conference the fraternal greeting of the organized Bar of the United States of America. On behalf of the more than thirty thousand members of our national Association, I salute our brethren in the profession throughout the Americas, and express to them our cordial and best wishes and felicitations.

We lawyers of America can take just pride, I think, in the accomplishments of our profession in all the lands from Hudson Bay down to the Straits of Magellan. In a brief span of history, a mere century and a half, we have brought to the world a new concept of law and order. We have given to constitutionalism a new meaning. We have demonstrated the possibility of achieving good government without trampling under foot the rights of man. We have pointed the way to the responsible democratization of political and legal institutions throughout the world.

An achievement of this magnitude has been possible only because of the enlightened leadership of great men, learned in the law, passionately devoted to liberty, and striving through their years to build ever sounder foundations for the temple of justice. If time permitted, I should like to name many of these great men. Not from one country merely, not from a single continent, but from all America, the giants have come. Some of the names stand out so sharply that they are known to lawyers everywhere—those of Barbosa and Calvo, in international law, those of Alverez and de Bustamente and John Bassett Moore. This great Republic of Mexico has supplied many leaders whom we in the North and you in the South feel privileged to revere, and it is a great satisfaction to me that at this critical time our Conference may be held in the glorious inspiration of the sublime Popocatepetl.

Peace Under Law the Hope of the Nations

We are passing through a critical period indeed. For the second time in a single generation, most of the peoples of the world are engaged in a destructive world war. Not in a remote corner, but all over the world, men find themselves diverted from constructive efforts into waging a horrible and devastating struggle. Lives are being sacrificed; treasure is being destroyed; hopes of millions of men and women are being thwarted. The picture offers to us a staggering challenge; and if I sense correctly the thought of America, that challenge is begetting a firm determination that these recurring world wars shall cease. We now hold before ourselves the hope of "laying the bases of a just and enduring world peace securing order under law to all nations."

A great struggle such as that in which the world is now engaged must bring with its hardships many advantages, and I am disposed to count it as one of the most fortunate developments of this war that such unity and solidarity has been achieved among the peoples of our twenty-two American nations. Fifteen of our countries are co-belligerents in the war, and all of the others have broken off relations with the Axis Powers. Never before were the Americas so united in a common cause; never before have we given such emphatic expression to our common aspirations. Joined together today in a war of liberation from tyranny, I hope we shall be as united tomorrow in restoring the world to peace and prosperity and in building on firm foundations of law, justice, and constitutional safeguards, the institutions which are needed for our common security.

The Stake of All the Americas is Sound Legal Foundations

It is not my purpose to deal with the political problems which will clamor for solution when the fighting has ceased in Europe and in Asia. They will require all the intelligence and imagination and ingenuity which can be mustered; and with many of my compatriots, I am hoping that these high qualities will be supplied by political leaders and outstanding statesmen from many of our American states. Every one of our peoples has a stake in the new world settlement, and I confidently expect that every one of them will have opportunity to make its contribution.

Aside from the political problems, however, we members of the legal profession have our special responsibilities. Unless the peace of the future is to have sound legal foundations, it is not likely to be enduring. And it will not have those foundations unless we lawyers are ready and willing to see that they are laid. We may not have the last word even in this phase of reconstruction, but we must have some word, and if we wish it I am rash enough to believe that it can be decisive.

The Gains for International Adjudication Must Be Retained

On one point, most of the leaders in political affairs seem to be agreed, and I venture to say that the legal profession is well-nigh unanimous. We wish to see

This is the English version of an address prepared for delivery before the Annual Meeting of the Inter-American Bar Association in Mexico City, Mexico, early in August. The address was delivered in Spanish—a language which President Henderson used during his professional work in Latin-American countries.

maintained the great gains which have been made during the past twenty-five years in provisions for the trial and pacific settlement of international disputes. Law and justice must be put and kept in first place among the nations. Restraints, by force if need be, must be placed on arbitrary power, among nations as between individuals and their governments.

This is a field in which solid progress has been registered, and our profession cannot with good conscience allow it to be sacrificed. We must do more, I suggest, and endeavor to find the practicable ways in which that progress can be extended.

Latin America Leads for International Arbitration

In the nineteenth century, the lead in the development of arbitration treaties was taken by Latin-American states; and, long before such a step was even considered in Europe, some of the South American states enshrined in their constitutions their devotion to the principle of international arbitration as a substitute for war.

At the first conference of American states, held in this city fifty years ago, a great Plan of Arbitration was launched, which has since served, and which still serves, as a landmark.

At each of the seven later conferences of American states, new stones have been laid in that edifice; and among our American republics today, we have a system of arbitration and conciliation treaties which no other regional group of states has approximated.

In recent years, we have been considering possible improvements in our Inter-American system, and I would mention particularly the valuable suggestions contained in the Peace Code proposed by the Government of Mexico in 1933.

America Has Been Devoted to International Organizations for Peace

This remarkable development has not prevented our American states from playing a prominent role in efforts of more general scope centering in other parts of the world.

With the single exception of my own country, all of the American states became at one time or another members of the League of Nations; and on numerous occasions American statesmen have assisted in efforts of the League to deal with vexing international problems.

Great American Lawyers Have Served the Court of International Justice

I wish to speak more particularly of the Permanent Court of International Justice, however, and I ask your permission to introduce what I have to say on this subject by paying homage to the great Americans who have given their time and energy to making this Court such an outstanding success. Not only did men like Raoul Fernandes and Elihu Root and Francisco Urrutia make notable contributions in the drafting of the Court's Statute, but some of our most enlightened jurists have served as judges of the Court, and some are still serving.

Judge de Bustamente has been a judge of the Court since 1921.

By a very happy coincidence Judge Gustavo Guerrero of El Salvador was serving as the Court's president when the war began, and with his sagacity and wisdom he continues to pilot the Court through the present storm.

We in the United States feel pride in the pioneering contributions made by Judge Manley Hudson, who has studied deeply the problems of the Americas.

American Interest in the Work of the Court

Throughout the period since 1921, most of our American states have taken an active interest in the work of the Court. Fifteen of them are now parties to the Statute of the Court; and thirteen of them have at some time accepted the Court's compulsory jurisdiction over legal disputes.

In addition to this, all of our American states without exception have acted in one way or another to confer jurisdiction on the Court. In the United States of America, this step was taken by becoming a member of the International Labor Organization.

In other American states, various other methods were followed. Particularly notable are the arbitration treaties concluded by Venezuela with Brazil and Colombia as recently as 1939 and 1940, and the aviation Convention concluded between the Argentine Republic and Chile in 1942—all of which make provision for the Court's obligatory jurisdiction.

On this record, it seems possible to say that not only have the American states not held aloof from the Court, but their support has enabled it to attain its high position as a World Court.

Satisfactory Procedure Followed by the Court

The procedure followed by the Court during its eighteen years of activity was remarkably satisfactory to the parties engaged in litigation before it. I speak as a "Philadelphia lawyer." I have represented foreign governments in important matters over some years, having personally been to the Argentine and Chile as well as Brazil on corporate matters and also immersed in a practice of local and national scope. As a result of all that I believe I am alive to the intricacies of procedural law in the courts before which I have to appear.

With my background, I marvel at the simplicity, the directness, and on the whole, the expedition, of the procedure worked out at The Hague. Fortunately, the Statute of the Court left to it a considerable measure of freedom in devising its procedure; and by a relatively frequent revision of its Rules the Court has been able to capitalize its own experience.

I am aware of no case in which any state has objected to the procedure followed. This fact is the more astonishing because a number of protests were made with reference to the procedure of tribunals created

within the framework of the Permanent Court of Arbitration.

Importance of the Work of the World Court

In eighteen years, the World Court took jurisdiction of sixty-five disputes. If some of the cases did not excite a general interest, each of them had importance for the states involved as parties. In the course of its work, the Court has handed down thirty-two judgments, twenty-seven advisory opinions, and several hundred orders.

The whole output represents a very substantial addition to the corpus of international jurisprudence, a rich store-house for the international law of the future. I am sure that all American lawyers, whether from North, or Central or South America, take pride in the fact that in no case was the authority of the Court flouted—in no case was there any serious incident.

We have come a long way, and I think that we can feel that the efforts of our profession have not been in vain, when states thus show themselves disposed to respect the authority of law and of judicature.

Cases of European Origin Before the World Court

It is true that the cases before the Court were for the most part between European states, or of European origin. Brazil was the only American state to appear before the Court as a party. I could have wished that our showing might have been better in this regard. To the extent that the record indicates that troubling disputes were not surging among the neighbors of the New World, it is to be greeted with satisfaction. Yet I fear that some of it must be put down to local politics, at any rate in my own country.

At times, we hear it said that The Hague is a long way off, that it is expensive to go there, and that all the judges may not be too familiar with our American conditions. I have some sympathy with the suggestion that more regionalism can be worked out in international adjudication, and I shall presently make a suggestion along that line.

Cases Submitted in Categories Formerly Excepted

It is also worth noting that some of the cases which came before the Court fell precisely within those catagories of disputes which, prior to 1914, were generally excepted in treaties looking toward obligatory arbitration. They related, in other words, to national honor and vital interest.

I think few of us today feel any nostalgia for that hackneyed formula; and certainly Denmark and Norway showed no fondness for it when they sought the adjudication of the *Eastern Greenland* case, nor did France and Switzerland when they submitted to the Court the *Free Zones* case.

This is but another indication of the advance we have made in creating this World Court, and in endowing it with the vitality of a life-and-blood institution.

Appreciation of the World Court's Advisory Opinions

I wish also to say a word of appreciation of the service rendered by the Court in its advisory opinions. That feature of the Court's jurisdiction came in for some criticism in my country. Despite the precedents in Canada, in some of the states of the United States, and in several states of Central and South America, it was even denied that the giving of advisory opinions could properly be made a judicial function.

Taking a pragmatic view of the matter, I am now disposed to look at the record, and to ask what was accomplished by the Court's exercise of its advisory jurisdiction. On this approach, I think one can entertain no doubt. In some cases, like the *Tunis-Morocco Nationality* case, the exercise led to a clarification of the powers of international bodies dealing with disputes; in others, like the *Night-work for Women* case, they solved problems encountered in the functioning of the International Labor Organization.

Moreover, the Court was at all times scrupulous in its respect for the safeguards of judicial action; and, when the new articles on advisory opinions were inserted in the Statute by the 1929 Amendments, they merely reproduced provisions previously embodied in the Court's Rules.

On this record, I think the lawyers of America may wish to say that the advisory jurisdiction has served a very useful purpose, without derogating from the judicial character of the Court.

The World Court Cannot Function in a Holocaust

In 1940, in a world engulfed in war, with most of the States arrayed in one of two opposing camps, it became impossible for the World Court to continue its work. It could no more function in a holocaust than in a vacuum.

Yet the postponement of the election of judges in 1939 did not deprive the Court of its bench, and twelve of the judges now continue in office. Its President and Registrar endeavor to carry on their duties from Geneva. So the Court remains in being today.

The Future of the Court a Concern of the Legal Profession

What is to be the future of the Court as the outstanding token of a future world of peace based on law? The question is particularly poignant for the legal profession, dedicated to the preservation of law and order in international as well as national affairs. I think it is a question for our profession to answer, and I venture to hope that the lawyers of the New World will unite in giving their answer.

To me, it is inconceivable that this great gain in the administration of international justice according to

law will be sacrificed or impaired. It is unthinkable that the world of the twentieth century would let this clock be turned back. It is imperative not only that we should keep the Permanent Court of International Justice, but also that we shall extend its powers, prestige and usefulness.*

In this order of ideas, we must work to find a way of continuing the existing Court and of reviving it in activity as soon as possible. Certain changes may take place, and it will be necessary to take account of them. The practical problems of electing the judges and meeting the expenses must be faced. This can be done, however, without disturbing the Court's continuity, without opening old contests, and without upsetting the vast structure of the world's treaty law into which the Court has been fitted.

The Place of the Court in the New International Structure

The Moscow Declaration of last October 30 has envisaged a general international organization to take the place of the League of Nations. In my judgment, the Court should be integrated in the new international structure. This may have some disadvantages, for it will tie the fortunes of the Court to those of what may be called in some respects a political system.

That tie will exist in any event, however; and I think the many advantages of a close association will outweigh the disadvantages. A viable and useful Court of International Justice cannot exist in a vacuum. It will need constant interest and continuing support, and governments will be made to feel it their responsibility. Its usefulness will depend upon its use. To be used, a Court must seem close to the men who can give it work to do.

Slight Amendments Will Adapt the Court to Its New Place

I suggest, therefore, that if the League of Nations is replaced by any form of a general international organization, some slight amendments in the Statute of the existing Court will be sufficient to adapt it to that change. At the same time, some improvements can be made; but the Statute need not be rewritten, and changes can be kept at a minimum and not be permitted to weaken the Court.

Two Changes in the Statute and Status of the Court

Two changes suggest themselves, neither of which would disturb the Court's equilibrium.

First, the Court should be better equipped to meet special and regional needs. It now has two chambers —one for labor cases, and another for communications cases—neither of which has ever been used. The statutory provisions concerning these chambers might be deleted, and the Court might be given a general power to create chambers as they may be needed.

*See Resolution No. 8 of the Second Conference of the Inter-American Bar Association adopted at Rio de Janeiro, August, 1943; also A.B.A.J., May, 1943, p. 249.

This suggestion is not of my own invention. Various people have made it, and various of them have claimed the credit for it. Only recently the credit for it was claimed by a group meeting in London. I think the credit must go to one of our American confreres, however. The suggestion was first made, apparently by J. A. Buero, delegate of Uruguay, at the Eighth Conference of American States in 1938. This is another of the many cases in which initiative has been taken in world affairs by American leaders of the legal profession.

The Statute of Its Court Needs a Process of More Expeditious Amendment

The second suggestion I make is that a provision for a process of expeditious amendments might be added to the Statute. Such provisions find place already in great international instruments like the Covenant of the League of Nations and the Constitution of the International Labor Organization. The omission of any such provision in the Court's Statute as it was drafted in 1920 may be put down as an oversight.

When amendments to the Statute were proposed in 1929, it took six and a half years to bring them into force, although no serious objections to them were entertained in any quarter. This defect in the Statutes can easily be repaired, without disturbing the Court's continuity.

Need for Giving General Jurisdiction Over Legal Disputes

Along these lines, it ought to be a simple task to adapt the Statute of the Court to new conditions, to keep the Court which the labor of generations has handed down to us, and to assure to it a useful role in the great tasks of international construction which lie ahead.

A more fundamental reform would give the Court general jurisdiction over legal disputes. If there is a disposition to move in this direction, I suggest that the step should be taken, not in the Statute of the Court, but in some separate instrument.

The Statute was designed merely to establish a judicial institution, and it does not impose any direct obligation on the States which are parties. This feature should be preserved, and even without a separate instrument conferring a general compulsory jurisdiction, we can hope for extensions toward that end under the optional provision in the existing Statute.

An Urgent Program for the Lawyers of the Americas

Here, then, is a program for our legal profession in the Americas. It is immediate, it is urgent, it is constructive. Our province as lawyers has its limitations. We have a field of special competence, and in living within that field we shall usurp none of the prerogatives of the politicians.

A world in travail calls out to us for our assistance; and when the watch-cry of millions of men in every part of the world is "an enduring world peace securing

(Continued on page 475)

JEFFERSON AND JUDICIAL REVIEW

By C. PERRY PATTERSON

Professor of Government, The University of Texas

The constitution is a mere thing of wax in the hands of the judiciary.—Jefferson.
Let us not make it a blank paper by construction.—Jefferson.

IT IS generally regarded by students of our system of jurisprudence that the doctrine of judicial review is inherent in a fundamental law, that the whole purpose of making a constitution a fundamental law is to establish limitations upon government, and that to maintain these limits there must be a body to judge of the conflicts between the acts of the government and the fundamental law, and that by making the constitution a fundamental law this right as well as duty becomes inescapable on the part of the courts in deciding cases involving these conflicts, and that they have no choice but to sustain the fundamental law in instances where these conflicts are irreconcilable.

Judicial Review Necessary for Maintenance of Principles in Fundamental Law

It is equally clear that any principle established in a fundamental law in final analysis becomes a matter for judicial enforcement. Hence, the principles of separation of powers and of federalism, if they are established in a fundamental law, inherently require judicial review for their maintenance. In fact it was the introduction of the principle of separation of powers into the first state constitutions that made it necessary to make the state constitution a fundamental law in order to preserve this doctrine. Jefferson was among the first of the forefathers to recognize this fact. He criticized the Virginia constitution of 1776 because it was not a fundamental law. It had been framed and adopted by a convention June 29, 1776, composed of forty-five members of the colonial House of Burgesses, before the issue of the Declaration of Independence and without consulting the people in any capacity whatsoever.[1] A few members of the lower house of the assembly had met, called themselves a convention, assumed constituent powers, drafted, and adopted a constitution. Jefferson contended that, despite the fact that the document called itself a constitution and even provided for separation of powers, it actually established legislative supremacy because it could be changed by the same authority that adopted it. "It is not the name", he said, "but the authority that renders an act obligatory."[2] "The other states in the Union", said Jefferson, "have been of opinion that to render a form of government *unalterable by ordinary acts of assembly*, the people must delegate persons with special powers. They have accordingly chosen special conventions to form and fix their governments."[3] To Jefferson, a constitution in order to be "an act above the power of the ordinary legislature" must rest on "the consent of the governed", otherwise "there is no legal obstacle to the assumption by the assembly of all the powers legislative, executive, and judiciary. . . ."[4] Here Jefferson contends that the Constitution must be a fundamental law to provide a "legal obstacle" against the assumption of powers by the legislative body. He evidently means that the courts would enforce the constitution as a "legal obstacle." This, of course, means judicial review, because no law whether fundamental or statutory could be a "legal obstacle" without judicial enforcement, and judicial enforcement of a fundamental law means necessarily the nullification of conflicting legislation, if the conflicts are brought to the courts in actual cases.

It must be remembered that the forefathers, Jefferson being foremost among them in this contention, maintained that the English Constitution was a fundamental law and that the acts of Parliament violating it were null and void.[5] It is not surprising to find that Jefferson contended that the first state constitution of Virginia, adopted even before the Declaration of Independence was issued, should be a fundamental law. So far as I have been able to discover from reading the works of the forefathers and the interpretations of their writings by many distinguished historians they all understood that a fundamental law by virtue of its supremacy and immutability by ordinary processes embraced the principle of judicial review. It was to the political world what the *lex natura* was to the natural world.

In the summer of 1783 it was expected that a constitutional convention would meet in Virginia with special powers delegated to it by the people to draft and adopt a constitution. Jefferson drafted a fundamental constitution for Virginia to be submitted to the convention in case it should meet. Speaking of the constitution of 1776, he said, "it has been thought expedient, that it should receive those amendments which time and trial have suggested, and be rendered *permanent by a power*

1. Ben Perley Poore, *The Federal and State Constitutions* (2d. ed., 1878) II, 1910.
2. *Writings* (Library Ed.) II, 169.
3. *Ibid.*, II, 171.
4. *Ibid.*, II, 173.
5. McIlwain, Charles Howard, *The American Revolution* (1923) 148-185.

superior to that of the ordinary legislature. The general assembly of this state, therefore, recommends it to the good people thereof, to choose delegates to meet in general convention, with powers to form a constitution of government for them, and to declare *those fundamentals to which all our laws present and future shall be subordinate.*"[6] This shows that the purpose of the convention was to substitute a fundamental law for the Virginia constitution of 1776 and to abolish legislative supremacy.

In the constitution proposed by Jefferson is a definite expression to this effect: *"The general assembly shall not have power to infringe this constitution. . . "*[7] Several additional absolute prohibitions on legislative power are proposed in this constitution. Again he states "that a convention is necessary for *altering* this constitution,"[8] and he refers also to laws *"not inconsistent with this constitution."*[9] It is indubitably clear that Jefferson was opposed to legislative supremacy and that he realized that a constitution as a fundamental law was the only way to prevent it. Judicial review as a means of enforcing a fundamental law had already been used in Virginia by Jefferson's law teacher at William and Mary, Professor George Wythe, who as judge in the case of *Caton* v. *Commonwealth of Virginia* (1782) said: "If the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, *pointing to the constitution, will say, to them, here is the limit of your authority; and hither, shall you go, but no further.*"[10] It is inconceivable that Jefferson, a graduate in law of William and Mary under Wythe did not understand that a fundamental law and judicial review were inseparable principles, and that in advocating one he was also advocating the other.

Judicial Review a Means of Harmonizing the Federal System or of Coercing the States

Not only was Jefferson among the first to advocate making state constitutions fundamental laws with judicial review to preserve them, but he was also among the first, if not the first, to suggest judicial review as a means of harmonizing the federal system or of coercing the states. It will be recalled that the chief problem in a federal system regardless of the distribution of powers is that of coercing the states. This was the chief problem under the Articles of Confederation and the failure to provide any solution of it was the main reason for the failure of the system. This would, of course, remain a difficult problem if the Union remained purely federal. It would continue to be a problem to the extent that the Union was kept federal in character.

There were three possible solutions. The states could be abolished and the Union made exclusively national. The Union might be kept exclusively federal and a coercive agent provided. The problem might be largely eliminated by making the Union primarily national, thus reducing the problem of coercion to the federal character of the Union. It was the latter solution that was made, but when the division of powers was made between the Union and the States the problem of coercion was in some respects aggravated because it had become as necessary to make the Union obey the Constitution as it was the states.

Solution to the Problem of Maintaining Federalism

This was the most difficult problem that the Convention which framed our Constitution had to solve. It is clear from Madison's Journal that none of the forefathers knew what the best solution of it was. It was suggested that the Union be allowed to use force upon the states. This might be done if the Union was kept exclusively federal, though coercion by force unless the states had been stripped of their militia would doubtless have ended in civil war and, at best, did not harmonize with a government of law. This suggestion was one of the features of the New Jersey or federal proposal.[11] However, this suggestion was inadequate if the system was to be "partly federal and partly national" because both the Union and the states operating independently of each other on a separate constitutional basis would each have to be kept within its own jurisdiction in order to preserve the division of powers. Nor under this arrangement would it do to give each the right to use force upon the other. The Virginia or national plan proposed that Congress be given the power to repeal the acts of the states that endangered the harmony of the Union.[12] With Congress being the judge in this eventuality, this would ultimately have meant the destruction of the states. How was federalism to be maintained?

It was while this problem was being discussed by the convention that Jefferson who was in correspondence with Madison from Paris made his suggestion that judicial review was the proper solution of this problem. Jefferson being primarily interested in preserving the powers of the states was opposed to the negative of the acts of the states by the Congress. Writing to Madison on June 20, 1787, on this matter he said: "The negative, proposed to be given them, (the Congress) on all the acts of the several legislatures, is now for the first time, suggested to my mind. *Prima facie,* I do not like it. It fails in an essential character; *that the hole and the patch should be commensurate.* But this proposes to mend a small hole by covering the whole garment. Not more than one out of one hundred state acts concern the confederacy. This proposition, then, in order to give them one degree of power, which they (the Congress) ought to have, gives them ninety-nine more, which they

6. *Writings* (Library Ed.) II, 282-283.
7. *Ibid.*, II, 287.
8. *Ibid.*, II, 298.
9. *Ibid.*, II, 299.
10. 4 Call (Va.) 5, 8.
11. Max Farrand, *The Records of the Federal Constitution* (1911) I, 245.
12. *Ibid.*, I, 21.

ought not to have, upon a presumption that they will not exercise the ninety-nine. But upon every act, there will be a preliminary question. Does this act concern the confederacy? And was there ever a proposition so plain, as to pass Congress without debate? Their decisions are almost always wise; they are like pure metal. But you know of how much dross this is the result."[13]

The essence of his objection is that the remedy and the evil are not commensurate. In other words, the remedy is not restricted to the evil. To give Congress the power to repeal one act of a state legislature, it is necessary to give it the power to repeal all the acts of all the legislatures in order for the principle to be established, and the principle in the end becomes that of congressional supremacy over the states. Now, what is Jefferson's solution? "Would not an *appeal*", he asked, "from the *state judicature* to a *federal court*, in *all cases where the act of confederation controlled the question*, be as *effectual a remedy, and exactly commensurate to the defeat?*"[14]

Here Jefferson suggests judicial process as the means of coercing the states. It is to be done by litigation restricted to actual cases involving a federal question by means of appeal from a state court to a federal court. This means that if a state court sustains the act of the state, the federal court would have the right to overrule the decision of the state court and declare the act of the state unconstitutional or as violating *"the act of confederation"*, which means the constitution. Here is the suggestion of judicial review for both federal and state courts, because there could be no point to bringing such a case to a state court unless it had the right to nullify an act of a state as well as to sustain it. In fact there can be no question of sustaining an act except on the predication that it might be nullified. Without the right to nullify, the invariable rule would be to sustain, in which case there would be no question before the court.

Jefferson, however, made the meaning of his suggestion indubitably clear by an illustration. "A British creditor, for example, sues for his debt in Virginia; the defendant pleads an act of the state, excluding him from their courts; the plantiff urges the Confederation, and the treaty made under that, as controlling the state law; *the judges are weak enough to decide according to the view of their legislature.* An appeal to a federal court sets all to rights."[15]

Here he shows that judicial review is to be exercised in actual cases involving the confederation (the Constitution) and a treaty made under that (the Constitution). Notice also that he speaks of the state judges being "weak enough to decide according to their legislature." What does this mean? It means if they are not strong enough to declare such an act unconstitutional, then an appeal is necessary to give a federal court a chance to declare it unconstitutional. Here is obviously a proposal for judicial review by both state and federal courts.

It is clear that Jefferson was thinking of the "act of confederation" and a "treaty made under it" as a fundamental or supreme law and that an act of a state legislature violating it was unconstitutional but that the courts were preferable to the Congress as the judges of such violations because the coercion would be a matter of enforcing a supreme law in actual cases. In other words the remedy would be adequate to, but only coextant with, the defect.

Now, it is not clear that Jefferson's suggestion would apply to the acts of Congress though it is worth noting that his illustration refers to a treaty made under the act of confederation. In other words, he regarded a treaty as a supreme law. One could infer from this that he chose a treaty rather than act of Congress for this reason. Also if a treaty had to be made under the act of confederation to be a supreme law, presumably an act of Congress to be law would be subject to the same limitation.

Another reason why Jefferson illustrated with a treaty was that he always regarded the Confederation, as he called it, as having for its primary function the management of foreign affairs. In fact, he never ceased to speak of it as "our foreign department". He thought of the state governments as the agents of our domestic affairs.

Protection to the Rights of the States

No one can say how much influence Jefferson's suggestion had over Madison in the further development of the supreme law of the land clause in the Constitution and in providing that the jurisdiction of federal courts should extend to all cases arising under it as the necessary means for its enforcement. This is true, however, that Jefferson suggested judicial review as the means of maintaining the Constitution before it was provided in that document. It is clear that he regarded this principle as a protection to the rights of the states, and it must have been a real satisfaction to him when he learned after the Constitution was finished that the principle was made applicable to the acts of the Congress as a means of preventing that body from overriding the Constitution and invading the powers of the states.

Evidence of this is found in a letter to Madison as to the importance of a bill of rights. He said: "In the arguments in favor of a declaration of rights, *you omit one which has great weight with me: the legal check which it puts into the hands of the judiciary.* This is a body, which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity. In fact, what degree of confidence would be too much, for a body composed of such men as Wythe, Blair and Pendleton. On characters like these, *"the civium ardor prava jubentium"* would make no impression."[16]

Here Jefferson adds to Madison's arguments in favor of a bill of rights by stating that it will extend the scope of judicial review and, therefore, act as a check upon the Congress. He literally swears by an independent judi-

13. *Writings* (Library Ed.) VI, 132.
14. *Ibid.*, VI, 132.
15. *Ibid.*, VI, 133.
16. *Ibid.*, VII, 309. The eagerness of citizens to do evil things.

ciary as a body in which it would be difficult to place too much confidence, if it was composed of the right characters. He mentioned three distinguished Virginia judges, among whom was Justice Wythe, his law teacher at William and Mary, who had declared an act of the legislature of Virginia unconstitutional in 1782 in the case of *Commonwealth* v. *Caton*. [17]

Jefferson did not like the executive which the Constitution provided, calling it a "bad edition of the Polish King", but he was mortally afraid of a legislature tyranny, having in mind the restrictive legislation of the British Parliament. His insight into the workings of political institutions far surpassed that of his contemporaries. He said: "The executive, in our governments, is not the sole, it is scarcely the principle object of my jealousy. *The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period.*"[18] If Jefferson were here now he would have no reason for changing this statement. The difference is that what was prophecy one hundred fifty years ago is now history.

It is clear from this quotation why Jefferson was so solicitous about judicial review. He had no confidence in either the executive or the legislative division of the government, but he did have confidence in the judiciary. He proposed to use the judiciary as the means of preventing "the tyranny of the legislatures". Notice that he used the plural of legislatures, including, therefore, the Congress as well as the state legislatures.

This completes the record of Jefferson on judicial review prior to the beginning of the operation of our governmental system. In the consideration of Jefferson's later pronouncements on judicial review it is necessary to call attention in this connection to three conditions on which he based his advocacy of judicial review as a paramount principle of the constitution: first, the independence of the judiciary; second, keeping it *"strictly to their own department"*; and third, judges of scholarship and integrity. It can scarcely be denied that these three conditions are indispensable essentials for the proper and constitutional operation of this principle. What was Jefferson's record as to these conditions?

The Independence of the Judiciary

One of the charges Jefferson brought against George III was: "He had made our judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[19] He said: "The judges should not be dependent upon any man, or body of men."[20] "The judges," he said, "should hold estates for life in their offices, or in other words, their commissions should be made during good behavior."[21] "I was against writing letters to the judiciary officers. I thought them independent of the Executive, not subject to its coercion, and therefore not obliged to attend to its admonitions."[22] "The Courts of Justice", he said, "exercise the sovereignty of this country, in judiciary matters, are supreme in these, and liable neither to control nor opposition from any other branch of government."[23]

The attitude of Jefferson was based upon his observation and knowledge of English and French judges under the monarchies of England and France. He knew the English judges had been controlled by the English monarchs prior to the act of settlement of 1701 or had been dismissed if they refused to accept executive dictation. He had seen Louis XVI call a session of the French Parlement (Supreme Court) and force it to register his edicts as the law of the land. He had witnessed the operation of the same sort of influence on American colonial judges. It did not require the omniscience of a deity to see that under such circumstances the judges were executive rather than judicial agents. Hence, judges should be independent of the Executive, but should they be completely independent? The English had made them independent of the Executive, but had subjected them to removal by a vote of Parliament. This was logical under a system of parliamentary supremacy, but was it consistent with the principle of constitutional supremacy and the separation of powers?

Conduct of Federal Judges Disturbing to Jefferson

Jefferson had expressed in the formative period of our Constitution almost complete confidence in the judiciary as the only division of government that would not abuse its powers. He had decided, therefore, it was the safest agent to be trusted with the preservation of the constitution. Our federal judiciary had not operated very long before Jefferson began to be disillusioned. He saw the federal judges undertake to develop and enforce a national common law without the slightest constitutional or statutory foundation for this authority. To him, this was destructive of the legal systems of the states and, therefore, thoroughly revolutionary. He witnessed supreme court Justices on their circuits wage political campaigns in their charges to juries. He witnessed the imprisonment of American citizens under the Alien and Sedition laws, which he regarded, and which John Marshall regarded, as unconstitutional. He saw Washington and Adams make Jay and Ellsworth ambassadors while they continued to hold the chief justiceship of the Supreme Court.[24]

This conduct of the federal judges was very disturbing to Jefferson. It looked to him as though they had become executive agents to be used in diplomacy and politics primarily, and incidentally as judges. Jefferson so completely shared the Whig jealousies of executive authority that it was a shock to him to discover that our consti-

17. 4 Call (Va.) 5, 8.
18. *Ibid.*, VII, 812.
19. *Declaration of Independence.*
20. *Writings* (Ford Ed.) II, 60. Letter to George Wythe, 1776.
21. *Ibid.*, II, 60. Letter to George Wythe, 1776.
22. *Ibid.*, I, 265 (1793)
23. *Ibid.*, VI, 421 (1793)
24. For a complete account of all the judicial irregularities of this period, see Charles Warren, *The Supreme Court in United States History* (1923), I, 124-168.

tutional system was being destroyed by executive control of the judiciary—the very agent that had been established to maintain the doctrine of separation of powers. Indeed, the situation was worse than in the days of English and French executive absolutism.

An impartial study of Jefferson will convince the honest student that he was the most ardent champion of the independence of the federal judiciary among the forefathers until he saw that it had become the agent of the President and of the federalist party. He said: "The dignity and stability of government in all its branches, the morals of the people, and every blessing of society, depend so much upon an *upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.*"[25]

When Jefferson became President he decided to see if he could restore the federal judiciary to its constitutional position or, possibly more accurately, to put it in its constitutional position by ridding it of federal politicans. He induced the Congress to repeal the recent legislation of the federalists by means of which they had packed the judiciary with their fellow partisans and then he undertook to purge the Supreme Court by the impeachment process. In this he failed. There was no recourse left except elimination by the law of mortality and the filling of vacancies as they occurred. Despite the fact that the Jeffersonians were in power for 28 consecutive years, they failed to change the federalist point of view of the Supreme Court although they (Jefferson, Madison, Monroe, and John Quincy Adams) had made eight appointments to the Court during this period. Jefferson felt that his cousin John Marshall, the Chief Justice, was controlling the Court.

"Whatever Power in Any Government Is Independent Is Also Absolute"

Jefferson began to feel that the federal judiciary was too independent. Moreover, he became very much alarmed over the nationalism that the Supreme Court was reading into the Constitution and the control it was attempting to exercise over the other departments of the government. *Marbury* v. *Madison* (1803),[26] *Martin* v. *Hunter Lessee* (1816),[27] *Dartmouth College* v. *Woodward* (1819),[28] *McCulloch* v. *Maryland* (1819),[29] *Cohens* v. *Virginia* (1821),[30] *Gibbons* v. *Ogden* (1824)[31] were in Jefferson's opinion examples of the exercise of constituent powers by the Court. He felt that the Court had increased the powers of the Congress and had invaded the powers of the executive and of the states. It had not only struck down many of the acts of the states and asserted its supremacy over the state supreme courts, but had excluded the states from the amendment process by amending the Constitution itself. He regarded the Court, therefore, as having become a creator of a centralization that, unless it was checked, would ultimately destroy the duality of the Republic. To the apostle of state rights this meant the destruction of not only his idol but of the principle for which they (the forefathers) had hazarded their lives and fortunes in the revolution. He said: "We already see the power, installed for life, responsible to no authority (for impeachment is not even a scare crow), advancing with a noiseless and steady pace to the great object to consolidation. The foundations are already deeply laid by their decisions for the annihilation of constitutional state rights, and the removal of every check, every counterpoise to the engulfing power of which themselves are to make a sovereign part."[32] "Our government", he said, "is now taking so steady a course as to show by what road it will pass to destruction, to wit: by consolidation first, and then corruption, its necessary consequence. The engine of consolidation will be its federal judiciary; the other two branches the corrupting and corrupted instruments."[33] Again he said: "The judiciary of the United States is the subtle corps of sappers and miners working underground to undermine the foundations of our confederated fabric. They are *construing* our Constitution from a coordination of a general and special government to a general and supreme one alone."[34] "The judges are, in fact," he said, "the corps of sappers and miners steadily working to undermine the independent rights of the states, and to consolidate all power in the hands of that government in which they have no important freehold estate."[35] "The Constitution," he said, "is a mere thing of *wax* in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, *as an axiom of eternal truth in politics, that whatever power in any government is independent, is also absolute;* in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes."[36] There were plenty of people of Jefferson's time who thought that such statements were the mere ravings of a madman but we of today are painfully and regretfully realizing the truth of them.

In the closing days of Jefferson's life, having witnessed the scandalous political character of the federal bench in the first decade of the Republic and now observing its determination to consolidate the Republic, he decided that it had been made too independent. He said: "The Judiciary is independent of the nation."[37] "Let the future appointments of judges", he said, "be for four or six years, and removable by the President and Senate. This will bring their conduct, at regular

25. *Writings* (Ford Ed.) II, 59. Letter to George Wythe, July 1776.
26. 1 Cranch 137.
27. 1 Wheaton 304.
28. 4 Wheaton 518.
29. 4 Wheaton 316.
30. 6 Wheaton 264.
31. 9 Wheaton 1.
32. *Writings* (Ford Ed.), VII, 256.
33. *Ibid.*, VII, 223.
34. *Ibid.*, X, 170.
35. *Ibid.*, I, 113.
36. *Writings* (Library Ed.), XV, 213.
37. *Writings* (Ford Ed.), X, 30.

periods, under revision and probation, and *may keep them in equipoise between the general and special governments.* We have erred in this point, by copying England, where certainly it is a good thing to have the judges independent of the King. But we have omitted to copy their caution also, which makes a judge removable on the address of both legislative houses. That there should be public functionaries independent of the nation, whatever may be their demerit, *is a solecism in a republic,* of the first order of absurdity and inconsistency."[38]

Later Jefferson modified the above suggestion, "A better remedy I think, and indeed the best I can devise would be to give future commissions to judges for six years (the senatorial term) with a reappointability by the President with the approbation of *both* houses. That of the House of Representatives imparts a majority of citizens, that of the Senate a majority of states, and that of both a majority of the three sovereign departments of the existing government, to wit, of executive and legislative branches. If this would not be independence enough, I know not what would be such, short of the total irresponsibility under which we are acting and sinning now."[39]

It is worth noticing that this reaction of Jefferson as to the independence of the federal bench never once caused him to suggest that the power of judicial review should be taken away from it. It is also important to notice that Jefferson's reaction was caused by the disposition of the court to increase the powers of the Congress and not because of its failure to do so. In this respect, Jefferson condemned the Court for doing what in recent years it has been condemned for not doing.

The Scope of Judicial Review

Jefferson said the judiciary should be "kept strictly to their own department."[40] His construction of the Constitution was "that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal."[41] This meant that judicial review did not apply to all constitutional questions. He said "to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy."[42] This is one of the quotations from Jefferson that is so frequently used to prove that he was against judicial review. Jefferson, however, in this same connection made perfectly clear the exceptions that he had in mind. He said "If the legislature fails to pass laws for a census, for paying the judges and other officers of government, for establishing a militia, for naturalization as prescribed by the Constitution, or if they fail to meet in Congress, the judges cannot issue their mandamus to them; if the President fails to supply the place of a judge, to appoint other civil or military officers, to issue requisite commissions, the judges cannot force him."[43] In another connection he mentioned the pardon power of the President. Who could maintain that any of these issues raised judicial questions?

It is clear from these citations that Jefferson was merely enumerating what the court calls "political questions." Would the Court review the findings of either house of Congress as to the qualifications of its members? Has it not said that Congress is final as to what constitutes a republican government in the states?[44] Has it not refused to enjoin the President from enforcing an act of Congress?[45] Could it force the President to enforce an act of Congress or one of its own decisions? Could it prevent the Congress from proposing an act which it had declared unconstitutional or the President from approving such an act? No, it might be futile for Congress to repass such act but the Court could not prevent it. Moreover, it might change its mind and hold the act constitutional. The court can render an unconstitutional decision as well as Congress can pass an unconstitutional act. Again, could not the President veto an act which he regarded as unconstitutional? In other words, as Jefferson said, the judges are not "the ultimate arbiters of all constitutional questions." Does this mean then that Jefferson was opposed to judicial review or that he did not believe that the Constitution gave the courts the power to hold acts of the President or the Congress unconstitutional? Not at all. It meant only that the courts could exercise this power in justiciable cases involving real litigants. He was merely insisting that the judiciary be "kept strictly to their own department."

Likewise under this doctrine of Jefferson, the President or the Congress or both could not prevent the Court from reversing itself or from deciding any case as it saw fit. Its decisions were binding on the parties to the case, but not on the President or the Congress who could place their own interpretation on the constitutionality of their powers and unless their acts came before the courts in actual cases, this interpretation was final. Jefferson believed that each department had to place an interpretation on its powers when it exercised them and that it was free from the other departments to follow its own discretion. An executive agent, if he is in doubt about the meaning or constitutionality of an

38. *Ibid.*, VII, 256.
39. *Ibid.*, X, 198.
40. *Ibid.*, V, 81.
41. *Writings* (Library Ed.), XV, 214.
42. *Ibid.*, XV, 277.
43. *Ibid.*, XV, 277.
44. *Luther* v. *Borden* (1849) 7 Howard 1.
45. *Mississippi* v. *Johnson* (1866) 4 Wallace 475.

act which he is to enforce, is unable to secure an advisory opinion from the courts. He has to make his own interpretation and accept responsibility for it. The fact is, so frequently overlooked in discussing the relations of the departments, that direct constitutional conflicts between them do not arise. The courts decide only cases between litigants and their decisions are binding only on the parties to the cases. They do not bind other American citizens, the President or the Congress. Any number of the exactly same character of cases can be brought before the same court and it would have to take jurisdiction of all of them, if it had jurisdiction of one of them, and decide them. How many times has the Supreme Court had exactly the same type of case brought before it? In a preliminary draft of his first message, Jefferson said: "Our country has thought proper to distribute the powers of its Government among three equal and independent authorities, constituting each a check on one or both of the others, *in all attempts to impair its Constitution.* To make each an effectual check, it must have a right, in cases which arise within the line of its proper functions, where, equally with the others, it acts in the last resort, and without appeal, to decide on the validity of an act according to its own judgment and uncontrolled by the opinions of any other department. . . "[46]

In his theory of separation of powers Jefferson never once denied the right of judicial review nor did he advocate the withdrawal of this right from the courts. He merely contended that this right could be exercised only in cases and that decisions in such cases bound only the parties to the cases. This was based on the fact that the Constitution restricts the jurisdiction of federal courts to cases and that, therefore, they can decide only cases. It was the Court's attempt to abridge the appointment power of the President in *Marbury* v. *Madison* that Jefferson opposed and not its declaration of the unconstitutionality of a part of the judiciary act of 1789. Writing in 1804 on his pardon of those convicted under the Sedition Law, he said: "The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; *because that power was placed in their hands by the Constitution.* But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it, because that power has been confided to him by the Constitution. The instrument meant that its coordinate branches should be checks on each other. But the opinion which gives to the Judges the right to decide what laws are constitutional and what not, not only for themselves *in their own sphere of action,* but for the legislative and executive also in their spheres, would make the judiciary a despotic branch."[47]

In the above quotation it is clear that Jefferson thought the Constitution gave the courts the power of judicial review. He had advocated giving them this power before the Constitution was written. He never once raised his voice against the application of this principle by the courts in the decision of cases. Professor Edward S. Corwin says: "Yet I cannot find that Jefferson ever actually denied the right of the Supreme Court to judge of the validity of acts of Congress."[48] From the beginning to the end he thought this was a constitutional right of the courts, but they should be "kept strictly to their department."

Qualifications of Judges

Jefferson's very high conception of what judges ought to be was basic in his attitude toward judicial review. In the beginning he had said that a judiciary composed of such men as Wythe, Blair, and Pendleton, three able and distinguished Virginia judges, would be trusted to preserve the Constitution. He believed that judges should be free to exercise their complete and uncontrolled discretion as to the constitutionality of laws, but he knew as well as we know now that the bench was primarily a matter of personnel. If, as he said, the *Constitution was wax* in the hands of the judges, what the Constitution would become would depend entirely on the character of the judges. Jefferson himself thought the Constitution should be interpreted in harmony with the ideas of those who framed it. He said: "I do, with sincere zeal, wish an *inviolable preservation of our present Federal Constitution* according to the true sense in which it was adopted by the states; that in which it was advocated by its friends, and not that which its enemies apprehended who therefore became its enemies."[49] "*The preservation of the Federal Constitution,*" he said, "*is all we need contend for.*"[50] He called "our national Constitution, the ark of our safety, and grand palladium of our peace and happiness."[51] He said "The Constitution . . . is unquestionably the wisest ever presented to men . . . "[52]

Jefferson placed more emphasis on the separation of powers than any of the other forefathers. He felt that if this principle could be preserved a great centralized tyranny could be prevented. We of today are in a position to see the foresightedness of this contention as we witness the powers of the Congress and of the courts drifting into the hands of a great national bureaucracy

46. *Jefferson Papers,* 1st series, Vol. VIII, No. 252.
47. *Writings* (Library Ed.) XI, 50-51.
48. IV *Mich. Law Rev.* (1906), "The Supreme Court and Unconstitutional Acts of Congress."
49. *Writings* (Ford Ed.) VII, 327.
50. *Ibid.,* V, 409.
51. *Ibid.,* VIII, 160.
52. *Ibid.,* V, 80.

headed by the most powerful and least responsible executive in the world. The almost complete destruction of the two great principles of the Constitution which Jefferson almost fanatically fought to preserve: (1) the separation of powers and (2) a balanced federalism, is responsible for our present situation. He said: "Were we directed from Washington when to sow, and when to reap, we should soon want bread."[53]

He firmly believed that the only way this revolution could be prevented was to prevent the federal judiciary from usurping the powers of the amendment process by exercising constituent powers which by the Constitution belong exclusively to the people. He said: "The engine of consolidation will be the federal judiciary . . ."[54] "*Consolidation*," he said, "*is but toryism in disguise.*"[55] Now, we are told that it is liberalism by those who claim to be doing business in Jefferson's name.

To prevent the federal judiciary from accomplishing the above objective Jefferson never once advocated taking the power of judicial review from it, but as has been shown he would have (1) changed the method of removal of federal judges, (2) restricted their powers by a rigid preservation of the separation of powers, and (3) appointed judges of the highest character. "The judges", he said, "should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness and attention; their minds should not be distracted with jarring interests."[56] "It is not enough," he said, "that honest men are appointed judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence. To this bias add that of the *esprit de corps* of their peculiar maxim and creed, that "it is the office of a good judge to enlarge his jurisdiction," and the absence of responsibility, and how can we expect impartial decision between the general government, of which they are themselves so eminent a part, and an individual state, from which they have nothing to hope or fear?"[57]

Theory of Preserving the Constitution

The result of this study is the discovery that Jefferson foresaw, more clearly than any of his contemporaries saw, the tendencies at work in our constitutional system which, if they were not checked, would ultimately destroy the foundational basis of constitutional government. He had said in the great Declaration that all governments derive "their just powers from the consent of the governed". The Constitutional Convention plus ratification by the people had been devised as the means by which governments deriving their powers from the consent of the governed could be established. This process had been followed in both the states and the nation. It was by following this process that constitutions became fundamental laws and, therefore, superior in validity to the acts of governmental agents. To Jefferson the Supreme Court was exercising constituent powers and, therefore, was doing the very thing which the above process was meant to prevent. In other words constitutional government was being destroyed and the people were being denied their constitutional right to say by the amendment process what changes should be made in the fundamental law. If the process by which our constitutions were made was necessary in order that they might be fundamental laws, then it logically followed that a constitution made by the Supreme Court is not a fundamental law and that government under such a scheme of things ceases to be constitutional government. Does our history prove that Jefferson was the greatest champion of constitutional government that the country has yet produced?

His theory of preserving the Constitution may be briefly stated in his own words as follows: "When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a *construction* which would make our powers boundless. Our peculiar security is in the possession of a written constitution. Let us not make it a *blank paper by construction* . . . . Let us go on then perfecting it, *by adding by way of amendment to the Constitution*, those powers which time and trial show are still wanting."[58] It can scarcely be doubted what Jefferson would say today about (1) presidential hegemony, (2) the torryism of centralization, (3) our French system of administrative law by the bureaucracy, and (4) the infinite variety of the Constitution—all constituting a revolution which, by comparison, makes his revolution of 1800 trivially insignificant. Would he not be compelled to say that "our peculiar security"—"a written constitution"—has been made by "construction" into a "blank paper"? After more than 150 years of loose construction of the Constitution by the Supreme Court, ending in almost complete uncertainty as to its meaning, if indeed it may not mean anything or nothing in particular, one wonders if strict construction plus the proper use of the amendment process would not have more nearly preserved the principle of a fundamental law.

53. *Ibid.*, I, 113.
54. *Ibid.*, VII, 223.
55. *Ibid.*, X, 379.
56. *Ibid.*, II, 59.
57. *Ibid.*, IX, 121.
58. *Ibid.*, X, 411.

Jefferson—The Constitutionalist

After all, was not Jefferson the soundest constitutionalist among the forefathers and, therefore, the strongest advocate of a fundamental law and judicial review? He clearly foresaw that judicial review could usurp constituent powers, destroy or render useless the amendment process, and thus take from the people the constitutional right of amending their fundamental law.

It was expected that both Congress and the state legislatures would overstep the constitutional limitations upon their powers. Madison said in the convention "that legislatures tend to draw all power into their vortex." It was the sole purpose of judicial review to prevent this. Jefferson wanted a vigorous exercise of judicial review for this reason. Jefferson's theory of strict construction of the constitution could have been realized only by a far more rigid exercise of judicial review than has been the case. In cases of doubt as to whether a power had been granted or denied to government, he preferred to resolve the doubt in favor of the people and consult the depository of sovereignty by the amendment process. In other words, Jefferson would preserve the sovereignty of the people by means of judicial review and the amendment process. It results, therefore, that Jefferson was our greatest champion of constitutional government which he would maintain by a rigid use of judicial review and which he would change only by the constitutional method of the amendment process.

PROGRAM FOR 67th ANNUAL MEETING

CHICAGO, SEPTEMBER, 1944

THE ASSEMBLY

Monday, September 11

FIRST SESSION

10:00 A.M.

The President, presiding

Call to order

Addresses of welcome by:

Honorable Stephen E. Hurley, President, Chicago Bar Association

Honorable Henry C. Warner, President, Illinois Bar Association

Response by Honorable Robert T. McCracken, Philadelphia, Pennsylvania

The Chairman of the House of Delegates, presiding

Annual address of the President of the Association

Opportunity for offering resolutions, pursuant to Article IV, Section 2 of the Constitution

Statement concerning the American Law Institute, by Honorable Herbert F. Goodrich, Philadelphia, Pennsylvania

Announcement by the Secretary of vacancies, if any, in the offices of State Delegates and Assembly Delegates

Nomination and election of Assembly Delegates to fill vacancies

Nomination of four Assembly Delegates for two-year term ending with the adjournment of the 1946 Annual Meeting

(Meetings of members present from states in which a vacancy exists in the office of State Delegate will be held immediately following adjournment to fill such vacancies.)

SECOND SESSION

8:30 P.M.

The President, presiding

Address by R. L. Maitland, President, Canadian Bar Association

Additional speaker to be announced

10:00 P.M.

Reception by the President of the Association to members and guests

Wednesday, September 13

THIRD SESSION

9:30 A.M.

The President, presiding

Election (by ballot) of four Assembly Delegates for two-year term ending with adjournment of 1946 Annual Meeting

Third Annual Meeting of the American Bar Association Endowment

Association Forum on International Organization for Peace and Justice under Law

Addresses by:

Honorable Manley O. Hudson, member of the Permanent Court of International Justice

Honorable Orie L. Phillips, representing the Committee to Report as to Proposals for Post-War Organization of the Nations for Peace and Law

Speaker to be designated by the Section of International and Comparative Law

Report by the Chairman of the House of Delegates (or the Secretary) as to matters requiring action by the Assembly

Amendments to the Constitution and By-Laws of the Association

Presentation of the winner of the Ross Bequest Award

Wednesday, September 13

ANNUAL DINNER

7:30 P.M.

The President, presiding

Presentation of the American Bar Association Medal

Address by Honorable George Wharton Pepper, Philadelphia, Pennsylvania

Additional speaker to be announced

Thursday, September 14

FOURTH SESSION

9:30 A.M.

The President, presiding

Presentation of Award of Merit to a state bar association and a local bar association

Report by Chairman of the House of Delegates (or the Secretary) as to matters requiring action by the Assembly

Addresses by:

Major General Myron C. Cramer, The Judge Advocate General of the United States Army

Rear Admiral T. L. Gatch, The Judge Advocate General of the United States Navy

Open forum—report of Resolutions Committee

Upon Adjournment of the Final Session of the House of Delegates

FIFTH SESSION

The President, presiding

Report by the Chairman of the House of Delegates of the action upon resolutions previously adopted by the Assembly

Action by the Assembly upon any resolutions previously adopted by the Assembly but disapproved or modified by the House

Unfinished business

New business

Presentation of new officers and members of the Board of Governors

Remarks by the incoming President

Adjournment

SECTIONS

The schedule of section meetings appeared in the July issue of the Journal at page 401. The detailed program of section meetings will be printed in the Advance Program which will be mailed to each member of the Association in early August.

THE HOUSE OF DELEGATES

The sessions convene promptly at 2:00 P.M. Monday, September 11; 2:00 P.M. Wednesday, September 13; and immediately upon adjournment of the morning session of the Assembly, Thursday, September 14. Items on the calendar will be considered in the order in which they appear, unless otherwise ordered by permission of the House.

The President, presiding

Roll Call

Report of the Committee on Credentials and Admissions, Bernard J. Myers, Chairman, Pennsylvania

Approval of the record

The Chairman of the House of Delegates, presiding

Statement of the Chairman of the House of Delegates, Guy Richards Crump, California

Report of the Treasurer, John H. Voorhees, South Dakota

Report of the Chairman of the Budget Committee, Willis Smith, Chairman, North Carolina

Election of Members of the Board of Governors as prescribed by the Constitution, Article VIII, Section 3

Offering of Resolutions for reference to Committee on Draft

Report of the Board of Governors, Harry S. Knight, Secretary, Pennsylvania

Reports of Committees:

Coordination and Direction of War Effort, Joseph W. Henderson, Chairman, Pennsylvania

Report as to Proposals for Post-War Organization of the Nations for Peace and Law, William L. Ransom, Chairman, New York

Aeronautical Law, J. E. Yonge, Chairman, Florida, jointly with Committee on Transportation and Communications of Section of International

and Comparative Law, Carl I. Wheat, Chairman, Washington, D. C.
Post-War Work Correlation, Carl B. Rix, Chairman, Wisconsin
War Work, Tappan Gregory, Chairman, Illinois
Administrative Law, Sylvester C. Smith, Jr., Chairman, New Jersey
Labor, Employment and Social Security, Robert F. Maguire, Chairman, Oregon
Civil Service, Murry Seasongood, Chairman, Ohio
Custody and Management of Alien Property, Otto C. Sommerich, Chairman, New York
Jurisprudence and Law Reform, John G. Buchanan, Chairman, Pennsylvania

Attention is called to the reports of the following committees which will be printed in the Advance Program, and which contain no recommendations.

In the event that time permits the chairman will be given opportunity for oral presentation.

Aeronautical Law, J. E. Yonge, Chairman, Florida
American Citizenship, Herbert F. Goodrich, Chairman, Pennsylvania
Commerce, Louis A. Lecher, Chairman, Wisconsin
Communications, Howard L. Kern, Chairman, New York
Legal Aid Work, Harrison Tweed, Chairman, New York
Professional Ethics and Grievances, Orie L. Phillips, Chairman, Colorado
Unauthorized Practice of the Law, David L. Maxwell, Chairman, Pennsylvania
Bill of Rights, Burton W. Musser, Chairman, Utah
Customs Law, Albert MacC. Barnes, Chairman, New York
Facilities of the Law Library of Congress, Harold L. Stephens, Chairman, Washington, D. C.
Economic Condition of the Bar, Charles B. Stephens, Chairman, Illinois
Improving the Administration of Justice, John J. Parker, Chairman, North Carolina
Ways and Means, Benjamin Wham, Chairman, Illinois

Report of the Committee on Rules and Calendar (including proposed amendments to the Constitution and By-Laws) Howard L. Barkdull, Chairman, Ohio

Report of the National Conference of Commissioners on Uniform State Laws, W. E. Stanley, President, Kansas

Reports of Sections:
Taxation, Weston Vernon, Chairman, New York
International and Comparative Law, Mitchell B. Carroll, Chairman, New York
Patent, Trade-Mark and Copyright Law, John D. Myers, Chairman, Pennsylvania

Reports will also be presented by such of the following Sections as may have recommendations calling for action by the House of Delegates, resulting from the regular Section meetings:

Bar Activities, William Doll, Chairman, Wisconsin.
Corporation, Banking and Mercantile Law, W. Leslie Miller, Chairman, Michigan
Criminal Law, James J. Robinson, Chairman, Washington, D. C.
Insurance Law, Frank E. Spain, Chairman, Alabama
Judicial Administration, Orie L. Phillips, Chairman, Colorado
Junior Bar Conference, James P. Economos, Chairman, Illinois
Legal Education and Admissions to the Bar, Albert J. Harno, Chairman, Illinois
Mineral Law, Rolla D. Campbell, Chairman, West Virginia
Municipal Law, James L. Beebe, Chairman, California
Public Utility Law, Freeman T. Eagleson, Chairman, Ohio
Real Property, Probate and Trust Law, Robert F. Bingham, Chairman, Ohio

Report to the House of Delegates upon Resolutions adopted by the Assembly for action by the House

Report of the Director of Membership, David A. Simmons, Texas

Reports of House Committees:
Draft, William W. Evans, Chairman, New Jersey
Hearings, John M. Slaton, Chairman, Georgia
Credentials and Admissions, Bernard J. Myers, Chairman, Pennsylvania

Presentation of any matters which any state or local bar association or any affiliated organization of the legal profession wishes to bring before the House of Delegates

Presentation of any matters which any section or standing or special committee of the Association wishes to bring before the House of Delegates

Report of the Board of Elections, Edward T. Fairchild, Chairman, Wisconsin

Unfinished business

New business

The President in the Chair

Statement of certification of nominations for officers, Harry S. Knight, Secretary, Pennsylvania

Election of Officers

JOINT TRESPASSES ON PATENT PROPERTY

By RUSSELL WILES
of the Chicago Bar

PATENT law is an extreme instance of law made by the courts to fit public convenience. The student of legal history should find much of interest in several of its peculiarities.[1] Of special interest is the present confusion about joint trespasses on patents created by the decision in *Mercoid Corporation* v. *Midcontinent Investment Co.*, 88 L. ed. 262; 60 U.S.P.Q. 21. This recent decision of the Supreme Court shrouds in uncertainty and creates a serious obstacle to legal action against one who aids or abets others in violating patent property.

Nor should the general lawyer be dismayed because a trespass on a patent is called infringement, and the commonest sort of joint trespass is called contributory infringement. There is going to be some new and unique law in this field, and the causes for the present confusion and the most practical solution deserve general consideration.

A patent gives the exclusive right to make, to use and to sell a patented article or composition, or the exclusive right to practice a patented process. One may invade a patent by violating any of these rights.

According to patent terminology, one who himself enters the forbidden field is the primary or direct infringer. The most frequent accessory is one who supplies to the primary trespasser the materials which he uses in the tortious act. For nearly a century our courts have recognized that some liability attaches to one who thus abets infringement,[2] but the whole subject is now shrouded in uncertainty.

Involved Problems Require Practical Rule

The interplay of four forces must be considered in seeking a practical rule. First, and most important, it is desirable to reduce litigation by permitting, whenever possible, suits against the comparatively few who are responsible for wide-spread individual trespasses. It is most undesirable to force multitudes of suits against small infringers. In a few historic cases where no other course was open to the patentee, (e.g., Driven Well patent[3]) great hardship was inflicted on many individuals.

The special opinion of Mr. Justice Jackson, in the *Mercoid* case overlooks this serious alternate. He criticizes the hitherto accepted rule, probably correctly, but seemingly thinks the patentee has no remedy if he must pursue numerous individuals. On the contrary, the patentee can very profitably pursue small infringers, but only under conditions very harsh to them. Probably a mechanized system for conducting suits against hundreds or thousands of infringers would pay, if only statutory costs were collected. However, it is pretty hard on a small infringer to load him with statutory costs. He would do better to settle on demand from an investigator-collector.

Second, theory leads most lawyers to prefer uniform rules for all kinds of joint torts. These two forces tend toward a rule broadly favoring the patentee.

Third, the special injustice in patent cases of the joint trespass rule which makes innocent participants liable for the entire damage, leads to an amelioration. The rule heretofore accepted as a compromise is that one is guilty of contributory infringement if he supplies materials with "knowledge, intent or belief" that they will be used in infringement. This rule will hereafter be called the intent rule. It is theoretically bad, as pointed out by Mr. Justice Jackson, in making intent an element of tort liability. It is practically bad for reasons appearing later.

Fourth, there is a strong tendency to leave traffic in unpatented articles entirely free. More important, however, is the insistence by makers of all sorts of staples, especially chemicals, that they shall not be liable merely because they happen to know what their customers are doing with their products.

These last two forces tend toward a narrow rule, or none at all. The rule finally adopted will not be directed by logic, but by expediency.

Mercoid Case Creates Uncertainty

The five opinions in the *Mercoid* case demonstrate the present uncertainty. The case turned on an unclean hands defense and the bearing thereon of an earlier decree, and there was no urgent need to say anything about contributory infringement. The Court's opinion (Justices Douglas, Stone and Rutledge) suggests the complete abolition of all contributory infringement liability, but possibly this opinion only means that such liability will not be recognized when the plaintiff has unclean hands.[4]

Justices Reed and Roberts apparently favor the conventional intent rule, and say that they cannot believe the Court means to abolish all liability.

Justice Frankfurter strenuously defends the intent

1. The study of patent law history is peculiarly easy because Robinson on *Patents* digests in footnotes to the appropriate sections all of the English and American patent cases substantially earlier than 1890. Robinson's work was so well done that there is no practical reason for searching beyond his book for cases he may have missed.

2. See cases collected in Robinson, Section 924.

3. Adjudicated in *Eames* v. *Andrews*, 122 U. S. 40.

4. Throughout the present paper plaintiff's right to sue is ignored. Nothing is considered but the tortious character of the act complained of.

rule as well grounded in law and morals.

Justice Jackson correctly criticizes the intent rule as bad in theory, and seems to deny all contributory infringement liability, although there is nothing in his opinion inconsistent with his accepting some new and better rule.

Justices Black and Murphy deny all liability because contributory infringement is not defined in the Statute. This opinion ignores the history of patent law, which is an ancient common law development imported into our system by the use of ancient common law terms. When our statute gave an action for infringement (i.e., trespass on a patent) it needed no further definition, and gave none. The courts were supposed to know, and did know what infringement was, and when joint trespasses on patents became common, the courts simply made what they considered were the necessary minor modifications of ordinary joint trespass rules and applied them. That the modifications do not work very well suggests a further change, but surely does not justify complete denial of all joint liability. There is no more reason on statutory grounds to deny liability for joint than for sole infringement. Neither is defined in the statutes, and both are definable by common law methods.

Practical Objections to the Intent Rule

The practical objections to the intent rule can best be shown by cases. An extreme example is found in *Henry* v. *Dick*, 224 U.S. 1, where the Court, *arguendo*, held that if an individual (primary infringer) were operating an infringing printing press, it would be contributory infringement to sell ink knowing it was to be used in running the press. Though there was a vigorous dissent in that case, the intent rule as thus exemplified, was accepted by all the Justices, the divergence of opinion being only on the question as to whether there was in fact primary infringement. And although the *Dick* case has been overruled on its main point, its definition of contributory infringement has not been seriously questioned until the *Mercoid* case.

The major practical objection to this rule is that under it, vendors of all kinds of commodities are liable for participation in the torts of others, over whom they have no control, or can be made liable by a simple notice from the patentee, charging them with selling to specified infringing customers for infringing use. Efficient sales organizations usually know for what their products are used, and under the intent rule are clearly liable if the use is an infringing one. Most dealers, particularly those in basic commodities, including chemicals, insist that they have a right to sell the public at large without assuming any responsibility for the use of their products, and that their knowledge of their customer's purpose is immaterial.

A second and serious objection is that the owners of very dubious patents, by threats of contributory infringement suits against dealers in necessary supplies, can and sometimes have led the dealers to refuse to sell an alleged infringer, thus putting him out of business without giving him a chance to infringe to such an extent as to force to trial the patent charged on. When threats are made to supply-dealers, who in some cases are very few in number, the patent lawyers of the dealers really decide, subject to the natural impulse to play safe, whether to put the customer out of business by means just as drastic as an injunction. The lawyers of the threatened and often frightened dealers should not be thus substituted for the courts. Everyone should have a right to buy supplies and to infringe so as to raise a justiciable question of patent validity.

The intent rule is bad in theory, as Justice Jackson observes; it is practically bad in extreme cases, and it should be changed. The Bar has felt for years that a change could be forced by filing an extreme suit, such for instance, as one praying against a gasoline dealer an injunction forbidding his putting gasoline into the tanks of some model of car charged to infringe a patent.

It has been suggested recently that the intent rule should be retained, but subjected to an exception excluding from its scope supplies for operating machines. While this change would eliminate some of the more spectacular results of the intent rule, it is wholly illogical and arbitrary. Why permit the sale of ink to run an infringing press, while forbidding its sale for use in an infringing printing process or for printing a patented kind of book? This proposal does not meet the criticism of the chemical supply dealers, most of whose wares, when used for infringing, are used in process patent or composition patent infringement. The chemical trade wants to be free to sell its products to anybody and to let the producer take the sole responsibility for their use.

Intent Rule Reduces Litigation

While both practical and theoretical considerations show that the intent rule is too broad, there is no need entirely to deny all joint liability in patent cases. The practical application of the intent rule has been immeasurably useful in simplifying litigation, and in protecting the just rights of patentees.

Let us consider some typical cases where the liability should attach, always remembering that the alternative is vastly increased litigation against many small primary infringers, to whom the cost of litigation is out of all proportion to their interest, and who are therefore specially open to the levy of heavy tribute under the threat of suit or after the commencement of suit.

Numerous infringers sell all the parts of an infringing device, more or less disassembled for convenient packaging, so that the assembly into the patented structure is made only by the ultimate consumer or by an intermediate dealer. The sale of a device in knocked-down condition has always been held to be infringe-

ment,[5] and it should be. Any other holding would be outrageous. Strictly speaking, however, the assembler is the only direct infringer; the original maker merely sells a lot of separate and individually unpatented parts.

Again, consider cases like the celebrated *Kerosene Lamp* case,[6] where the infringer copied the patented lamp, but omitted the glass chimney, which the ultimate consumer bought independently. The sale of the whole lamp except the chimney, which the customer supplied, was clearly contributory infringement. A contrary holding would be practically and theoretically wrong. This case is typical of many where the defendant made and sold parts of a patented combination, which parts had no practical use except in the combination, so that any normal use of them would infringe. These were the earliest contributory infringement cases, and the rule might well have been limited to them.[7] However, the prestige of Robinson,[8] and of the Court of Appeals of the Sixth Circuit, when Taft and Lurton were on its bench,[9] led to the acceptance of the broader intent rule.

The *Tesla Motor* litigation[10] demonstrates the need for some rule. For technical reasons the main patent was in process form, and covered the rotating field which is automatically set up in many alternating current motors, and practically all alternating current meters. The only primary infringers were the numerous ultimate users. The courts, under the contributory infringement rule gave direct relief against a comparatively few builders of motors and meters which necessarily infringed when put into use.

Similarly, in the *Grant Tire* litigation,[11] simple and direct relief was had against a comparatively few rubber makers, whereas without the contributory infringement rule, a vast number of suits would have been brought against small carriage builders and repair men. The patent covered a tire composed of a special rim bought from the steel companies, a special rubber part (90% in value of the whole combination and useless for any other purpose) bought from the rubber makers, and two wires bought on the open market. The assemblers and users were the only primary infringers, but by suing the rubber makers as contributory infringers, the patentee got comparatively simple and wholly just compensation.

Injustice of Abolition of Remedy for Contributory Infringement

The total abolition of the contributory infringement rule would work grave injustice both to patentees and to the hosts of small primary infringers who have heretofore been protected from direct attack because of the easier and better remedy which let the patentee sue the original manufacturer of special parts.

It will be a calamity if the rule is not kept in a form sufficiently broad to cover these cases. Nobody should make parts or devices usable only in infringement, and the courts should give relief against such practices. If they do not, they will be swamped with little suits against hosts of little infringers. Patentees prefer to proceed in a simple way, but they can probably make as much money by a properly systematized collection organization, which carefully follows up small trespassers.

The rule also should cover an intermediate class of cases in which the defendant solicits or causes infringement with the products it sells. While it seems best that a maker of staple chemicals should be allowed to sell them freely regardless of the purpose of his customer, he should not foment infringement by urging his customers to infringe or directing them to infringe. A reputable vendor of chemicals seldom suggests, indeed, he is usually careful not to suggest that his customer infringe. He sells only when his customer has independently decided on his course of action, and seeks a source of supply. The rule ought to cover cases where a maker of supplies performs some overt act of teaching or urging a particular infringing use.[12] That modification would meet Mr. Justice Jackson's theoretical objection to the intent rule. Tort liability should not depend on intent or knowledge, but only on overt acts.

Considering the thermostat dealt with in the *Mercoid* case, the maker ought to be allowed to sell common thermostats on the open market, without incurring any liability whatever. He should not be allowed to sell specially designed thermostats which have no practical use except in an infringing system.[13] Nor

5. *Strobridge* v. *Lindsay*, 6 Fed. 510.
6. *Wallace* v. *Holmes*, F. C. 17100.
7. The results in these cases doubtless could be attained on general principles of proximate cause. One who sells an article which when used will infringe can be held liable on the theory of the squib case. (*Scott* v. *Shephard*, 3 Wils. C. P. 403, 2 William Blackstone, 892).
8. Robinson on *Patents*, Section 924.
9. *Thompson-Houston* v. *Ohio Brass Company*, 80 Fed. 712, 721.
10. The cases involving this patent are largely collected in the *Federal Digest* under Patent 382,280 in the Table of Particular Patents although more are shown at 152 Fed. 467.
11. The cases are largely collected in the *Federal Digest* under Patent 554,675 in the Table of Particular Patents.
12. Although the leading cases treat contributory infringement as a special form of joint trespass, even the modification here urged can be grounded on principles of proximate cause. It is reasonable to say that the sale of an article which may or may not be used in infringement is not *per se* the proximate cause of the infringing action of the buyer, but that the sale of the same article with directions as to how to use it in infringing is the proximate cause of the use taught.
13. The case of *Leeds and Catlin* v. *Victor Talking Machine Company*, 213 U. S. 325, has given a great deal of trouble. The Reed-Roberts opinion clearly shows where the trouble lies. If it is conceded, as there found, that a phonograph with one record which will play "Yankee Doodle" is a complete machine and that changing records so that the phonograph will play "Hail Columbia" is an unlawful and infringing reconstruction of the machine beyond the implied right of its owner, then the sale of records which have no practical use except in such unlawful reconstruction should be actionable. If that case is wrong, its error lies in the holding as to what is primary infringement by the owner of the phonograph and not in its holding as to what is unlawful contribution. Of course, present ideas about plaintiff's conduct might lead to a reversal of this case but that would not affect the basic question of contributory infringement here dealt with.

should he be permitted to sell even a common thermostat when he combines it with directions or circuit diagrams which lead his customer to infringe and teach him how to do so.

Conclusion

In conclusion, while the old intent rule is objectionable in theory, and too broad in practice, the total abolition of all contributory infringement liability would be wrong. Theoretically, joint participation in trespasses on patents should create some liability. Practically, to force suits against numerous small primary infringers, by denying this simpler remedy, would be unfair to patentees, and oppressive to the public. It will be calamitous if liability is not recognized in the type of cases which originally created the rule, i.e., cases where defendant sells articles made specially for infringing use, and having no other normal use. It would be wiser and fairer, both to the patentee and the public, to hold that it is actionable to cause or induce infringement by selling supplies, and recommending or teaching infringing uses of them.

NATIONAL SOVEREIGNTY AND INTERNATIONAL ORGANIZATION

By JOHN K. RUCKELSHAUS

of the Indiana Bar

AT THE CONCLUSION of this war will our government participate with other nations in the formation of a political organization with jurisdiction to determine international problems? One of the chief questions to be raised in considering this proposed participation will be—Would our joining such an international organization involve a violation of our national sovereignty? Many citizens will turn to the members of the legal profession for an answer to this confusing question.

It is sometimes said that few people are concerned with the legal side of sovereignty. But under our constitutional system of government it is impossible to avoid such a consideration. Cooley in his work *Constitutional Limitations* defines the term "constitution" as "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised".[1] Thus it would seem to follow that our question is necessarily legal in character, namely, whether a treaty providing for our participation with other nations in the establishment of an international organization for the settlement of problems among governments would be authorized by the Federal Constitution. If we find constitutional sanction for a treaty of such a character, then there can be no justification for this charge that our joining such an international organization would violate our national sovereignty.

By international organization we do not mean a superpolitical state which will be empowered to determine domestic matters. However, such an organization would undoubtedly embody a world court, a council or representative group with executive and legislative functions, with authority carefully limited to deal solely with designated international problems.

Examine the meaning of this term "sovereignty". According to Webster's International Dictionary this word is defined: "The supreme political power, authority or status of person or persons whom the citizens as a body habitually obey; the power that determines and administers the government or state in the final analysis. Thus, in a republic, as the United States, the sovereignty is in the body of enfranchised citizens."[2] The Articles of Confederation expressly provided that sovereignty was vested in each of the thirteen states or colonies. But the Declaration of Independence and our Federal Constitution repudiated that theory and decided that this supreme power was in the people of the United States as a whole. The verdict of the Civil War, of course, further vindicated the latter theory.

The people of the United States being sovereign had the right at the time they adopted our national Constitution to delegate certain designated powers to the federal government. Among the powers delegated to the Executive was the "power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur".[3] This instrument also provided that all treaties made together with the Federal Constitution and the laws made pursuant thereto "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding".[4] The individual states were further-

1. Cooley *Constitutional Limitations*, 8th ed. p. 3.

2. It can be claimed that the modern popular use of sovereignty means something other than the definition assumed by this writer; that sovereignty today usually is intended to refer to national independence. It is the contention of this paper that the modern use of the term is not proper; that also there is involved in this discussion more than a difference over the definition of a word. See an article entitled "That Bugaboo—The Word 'Sovereignty'" by Senator Joseph H. Ball, New York *Times*, Oct. 31, 1943. *Encyclopedia Britannica*, vol. 21, p. 98, 14th edition.

3. See Article II, Sec. 2, Federal Constitution.

more prohibited from making treaties.[5]

Would the term "treaty" as used in our Constitution be broad enough to cover an agreement providing for our participation with other nations in the establishment of an international organization empowered to determine questions involving our national government? It would seem to be clear that such an agreement would be a proper subject of a treaty under our law. The Supreme Court of the United States through Mr. Justice Field stated in *Re Geofroy* v. *Riggs*, 133 U. S. (1890) 258, at page 267, as follows:

> The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids or a change in the character of the government or in that of one of the states or a cession of any portion of the territory of the latter without its consent (citation of authority). But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

It has been asserted that there is no decision wherein a court has decided that a treaty was invalid under our law.[6]

A treaty obviously could not contain a provision which would nullify the Constitution itself. A problem might arise if an international organization was entrusted with the right to declare war for all governments which were parties thereto, including the United States, in view of the constitutional provision giving Congress the sole right "to declare war". However, no one seemed to question the authority of our government to bind itself to outlaw war in accordance with the provisions of the Pact of Paris (Kellog Treaty) adopted on August 27, 1928. A treaty obligation on our part to wage war would probably be legally effective only if Congress approved a declaration of war.

Such a treaty would require an approval by a two-thirds vote of the United States Senate. Approximately twelve hundred agreements involving our government with other countries have become effective without this advice and consent of the Senate under the two-thirds provision.[7] For example, Texas, the Hawaiian Islands and the Samoan Islands were annexed by executive agreement rather than by treaty. No one of these three acts was accomplished by procedure designated by our Federal Constitution. But in the instance of the plan to be submitted at the close of the present war, few would seem seriously to suggest that our participation with other governments in an international organization should be accomplished by any other route than by a treaty approved by the requisite number of Senators.

At the very outset our Constitution expressly provided that the provisions of a treaty once duly adopted become the supreme law of the land. Our courts have long recognized that a state law was superseded by a conflicting treaty provision. Thus, for illustration, if a treaty between Canada and the United States provided that a Canadian citizen would inherit property in the United States in the same manner as a citizen of our country, such a treaty provision would prevail even though there was a statute to the contrary in the state where the property of the deceased party was being administered.[8] It also has been held that a treaty provision will supersede a prior conflicting congressional enactment. There would appear to be some question whether a treaty provision would be abrogated by a federal statute enacted at a time later than the date when the treaty was approved.[9]

The above considerations should afford us convincing proof that a treaty providing for our participation in an international organization to enforce international law is not inconsistent to the provisions or the spirit of our Federal Constitution. On the contrary, the framers of that document saw to it that our federal governmental structure was so formulated as to leave ample room for our participation in international affairs. There is surely a distinction between the claim that it is unwise to exercise a specific power and the claim that the power was never created.

Judge Robert N. Wilkin, of the United States District Court of the Northern District of Ohio, observed, "An adherence to a world organization would therefore be not so much a limiting of our national sovereignty as an extension of the law by which we now live."[10] Rather than a violation of our sovereignty, the adoption of a proposal for our participating in such an organization would constitute the exercise of a constitutional power expressly authorized by the sovereign people.

If such is the case, what is the explanation for this idea that a violation of national sovereignty is necessarily involved when we elect to participate in an international organization? In conclusion it would be well to note one fundamental factor involved in this unfounded notion. In this idea that the state or nation is sovereign rather than the people there is involved a point of deep significance. Even in our country modern political writers and speakers have repeatedly reverted to the idea exemplified by the Articles of Confederation, but repudiated by our Constitution, that the state is sovereign.[11]

Would the men who wrote our Declaration of Inde-

4. See Article VI, Federal Constitution.
5. See Article I, Sec. 10, Federal Constitution.
6. Hershey "Treaty Making Power", *Indiana Law Journal*, p. 261, Vol. 1.
7. McClure *International Executive Agreements*, 1941; Colegrove, *The American Senate and World Peace*, 1944.
8. See 4 A.L.R. 1372, *Baby* v. *Dubois*, 1 Blackford 255; *Lehman* v. *State*, 45 Ind. App. 330.
9. See Hershey "Treaty Making Power", *Indiana Law Journal*, p. 264, Vol. 1; 11 A.L.R. 166.
10. Robert N. Wilkin "Judicial Order Fundamental for Peace", *Notre Dame Lawyer*, Vol. XVIII, p. 135.

pendence and our Constitution have agreed that even the people were sovereign—that nothing was of superior authority? Even that contention would have to be qualified. For the Declaration of Independence reads:

> We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed;

From the above it is clear that the universal God-given natural law is sovereign; that within that framework the people do have the ultimate authority. Governments do not derive unlimited power from the consent of the governed. It is significant that according to this document governments derive only their *just* powers from the consent of the governed.[12]

Mr. John Quincy Adams in a remarkable speech celebrating the fiftieth anniversary of the date when Washington took the oath of office as president of the United States said, on April 30, 1839, at New York City:

> The Declaration of Independence and the Constitution of the United States are parts of one consistent whole, founded upon one and the same theory of government, then new in practice, though not as a theory, for it had been working itself into the mind of man for many ages, and had been especially expounded in the writings of Locke, though it had never before been adopted by a great nation in practice.
>
> There are yet, even at this day, many speculative objections to this theory. Even in our own country, there are still philosophers who deny the principles asserted in the Declaration as self-evident truths—who deny the natural equality and unalienable rights of men—who deny that the people are the only legitimate source of power—who deny that all just powers of government are derived from the consent of the governed. Neither your time, nor perhaps the cheerful nature of this occasion, permit me here to enter upon the examination of this anti-revolutionary theory, which arrays state sovereignty against the constituent sovereignty of the people, and distorts the Constitution of the United States into a league of friendship between confederate corporations. I speak to matters of fact. There is the Declaration of Independence, and there is the Constitution of the United States—let them speak for themselves.[13]

A late great philosopher insisted that there were two types of people in the world, one who subscribed to an absolute and admitted such as a fact and the other who subscribed to a certain absolute and denied it. In our time we have largely repudiated the proposition that above all human authority is God and the universal moral or natural law; that such alone is absolute or sovereign.[14] Instead many have consciously or unconsciously turned to the state as the substitute for the old absolute; the state or the nation has been made sovereign. Under our traditional American system the state or nation was not the primary source of political authority. On the contrary, the people within the framework of God-given natural law were sovereign. The people created a federal government to handle national problems. Under that American constitutional system international law which governed international problems was expressly recognized.

It is recognized that there are alternative political theories not embraced by either of the schools of thought which would place sovereignty in the people subject to the natural law or in the state. In November, 1943, the editors of *Life*, *Time*, and *Fortune* prepared a joint statement entitled "Our Form of Government". The editors described a third view when they said:

> The eighteenth century conclusions about government are no longer taken for granted; the acids of modernity have eaten them away. Modern man no longer accepts the absolute of "natural rights". His philosophizing persuades him that he conferred these rights on himself and can therefore take them back.

James Wilson was one of the six men who signed both the Declaration of Independence and the Constitution. He wisely predicted the consequence of abandoning the natural rights philosophy, when he said:

> If this view be a just view of things, then under civil society man is not only made for, but made by the government; he is nothing but what the society frames; he can claim nothing but what the society provides.[15]

This point of view which would put sovereignty in the people uncontrolled by the natural law has not evidenced sufficient strength to stop the march toward the absolute state.

In this abandonment of the philosophy of the Declaration of Independence and the acceptance of the idea of national sovereignty there rests an important explanation of the modern notion of the inevitability of international anarchy. If the state is sovereign, then it is difficult to conceive of any law or organization for its administration beyond the national frontier. If the people under a universal natural God-given law are sovereign, it is reasonable to conclude that a part of this natural law must have to do with international affairs. Such undoubtedly was the general concept of the men who formulated our Constitution. They said so. If we are to succeed in doing our fair share toward the establishment of an international organization with the authority to determine disputes between governments on the basis of law, it might be well to follow the lead of those men who drafted our Declaration of Independence and formulated our Federal Constitution by repudiating this mistaken notion of "national sovereignty" and recapturing their philosophy which would place sovereignty in the people subject to the natural law.

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11. Garner *Introduction to Political Science*, Chapter VIII, p. 237.

12. It is interesting to note that both Plato and Aristotle subscribed to the general notion that the naural law alone was sovereign. See Plato, "Laws", 4.715; Aristotle, "Politics", 4.4; 3.15. Plato said, "I see the state in which the law is above the rulers, and the rulers are inferior to the laws, has salvation."

13. World's Best Orations, Vol. I, p. 92.

14. Karl Marx, "Marx Engels Critical Edition", Vol. I, p. 590. Marx states, "That each man has a value as a sovereign being is an illusion, a dream and a postulate of Christianity which affirms that every man has a soul."

15. The Works of James Wilson, edited by James DeWitt Andrews, Chicago, 1896.

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EDITORIAL OFFICE

LOUISE CHILD ..... Assistant to the Editor-in-Chief
1140 N. Dearborn St. ..... Chicago 10, Ill.

Hitler's Secret Weapon

THE "Robot plane" has now been employed by the Nazi Fuehrer long enough to permit the British and our own military authorities to appraise its purposes and its effects.

We do not here propose to deal with tactical and strategic considerations, but there is one phase of this murderous assault which every American citizen should study with deep concern.

The "Robot plane" is a manifestation of the extremes to which the horrors of war can be carried by desperate conscienceless killers.

It is powerless to prevent an invasion or an attack, because its missiles must travel in a fixed direction subject to almost no variation, and can therefore be avoided by a mobile fleet or a maneuvering army. Its chief effectiveness, therefore, is the destruction of cities and non-combatant citizens.

It possesses another use, almost as base and cruel. It can be and is being used as a weapon of propaganda, to deceive the civil population of the lands dominated by Nazism, and to lead them to a false hope of ultimate victory.

This great and growing menace to those of us who wish to live in a free world, should strengthen our determination to continue the struggle for victory until all aggressors shall be stripped of power to resort again to armed conflict for acquiring the lands and possessions of other nations.

There is growing evidence of an accord that the discussion of the terms of peace cannot make much worthwhile progress, until those who have plunged the world into war are deprived of power to start another conflict.

There seems also to be a growing public opinion that the difficulty of such a task does not justify the abandonment of effort for a permanent peace, through some concerted plan devised and guaranteed by the peace-loving nations, which shall substitute justice for force in the settlement of controversies between nations.

Unless such international agreement is reached, the Robot plane of the next war may be so perfected that this planet will not be a fit place for human habitation.

Hitler's secret weapon calls for the serious consideration of men of our profession, because it is a threat to government by law, and because it involves the framing of the most important of all international contracts and relationships, a contract on which will depend the possibility of permanent world peace. Unless the world unites to forbid the resort to the use of such weapons, we face the unchecked sequence of wars for conquest.

Lawyers of the Americas Meet Again for Consultations

AS this issue of the JOURNAL goes to press, a considerable number of members of the American Bar Association are in Mexico City as its delegates to the annual convocation of the Inter-American Bar Association. The objective of that organization, formed a few years ago with the active cooperation of the American Bar Association, is to federate the organized Bar of all of the countries of North, South and Central America, into a group for discussion and cooperation as to matters of common interest to the profession of law and to the public in this hemisphere.

The rise and seasoning of this promising confederation have taken place against the background of World War II and have gone forward despite the severe handicaps imposed by distances, travel restrictions, and inevitable preoccupations with other tasks. But if the war has brought impediments, it has led also to a heartening growth of unity and solidarity among the lawyers of the Americas and has given an enhanced public importance to such meetings as have been held, in Washington two years ago, in Rio de Janeiro last year, and in Mexico City this year.

Lawyers have naturally been leaders, in virtually all of the countries represented, in fostering a unity among the nations of the two continents and an adherence to the cause of the United Nations in the mighty struggle against the foes of peace, justice and law. This year's sessions will, it is earnestly anticipated, be a factor in furthering a common understanding as well as concerted endeavors for a post-war world which will hold fast to the fundamentals of responsible republican government through democratic processes.

As heretofore, the delegation of lawyers from the United States is appropriately headed by the President of the American Bar Association. A fortunate and timely aspect is that this year's President of the Association, Mr.

Joseph W. Henderson, of Philadelphia, is able to deliver in Spanish the address which he prepared for this meeting in Mexico City. Its title and theme are in the vital field of "International Justice According to Law." The English version of this address is published elsewhere in this issue. It deserves careful reading by all members of the Association.

In a most significant fashion, President Henderson traces first the great and enduring strides of progress which have been made, in this hemisphere, for the pacific settlement of controversies between nations, by means of orderly arbitrament or adjudication based on the principles of justice, fair play and developing precedents which take on the character of law. He pays a well-deserved tribute to the leadership and the constructive contributions which have been provided by outstanding lawyers and jurists of many of the American countries, and the support which they have received from the rank and file of the profession of law in their lands. The great and growing importance of the World Court is also shown and stressed. This all makes an interesting and timely chronicle.

Basically, President Henderson's appeal is that the lawyers of all of the Americas shall now interest themselves actively and insistently in the great project of establishing the rule of law, justice and impartial adjudication throughout the post-war world.

President Henderson declares the Permanent Court of International Justice to be "the outstanding token of a future world of justice based on law." The strengthening of the principle and practice of adjudication in international disputes and conflicts he regards as "particularly poignant" for the legal profession. "Unless the peace of the future is to have sound legal foundations," he declared, "it is not likely to be enduring. The alternative of law is anarchy." He expresses confidence that American lawyers can have a large, perhaps decisive, voice in accomplishing an adequate post-war structure of international justice.

In this as in other public discussions, President Henderson reveals his basic belief that the overthrowing of arbitrary power and the establishing of the rule of law, in the international sphere, have a basic relationship to the maintenance of free government and human rights based on law rather than discretion, in the government and life of each republic. If absolutism is permitted to rule the world, the domestic affairs of no country can be expected to escape the ascendancy of arbitrary power based on discretion, however well meant. In contending for the establishment of law and adjudication in international affairs, American lawyers are not merely helping to prevent recurring wars and to safeguard the peace. They are fighting for things which are essential to preserving, in their respective countries, the atmosphere of free government and the independence of the profession of law. In short, they are helping to save and continue conditions which are necessary for the continuance of impartial and independent courts, a useful and courageous profession, and the service given by lawyers to clients engaged in perpetuating the advantages of the American system of private enterprise.

Thus, it will be seen that the American Bar Association's traditional adherence to and support for the cause of "international justice according to law" are all a part of the same contest which the Association is waging, in the Congress and in the forum of public opinion, against administrative absolutism in any form and against the substitution of unreviewed discretion for the orderly processes of adjudication and the law-governed enforcement of human rights. The future of lawyers as well as of law is at stake, in both contests. The struggle for law and adjudication and the substance of rights, in the internal affairs of the nations, will not be long won or securely held if the effort for law and justice among nations is suffered to fail.

The topic of President Henderson's forthright address in Mexico City seems certain to be of outstanding interest in the deliberations of the Association, its House of Delegates and its Assembly, when those bodies meet in Chicago on September 11.

Proposed Amendments to Federal Rules of Civil Procedure

IN THE July issue comment was made on the proposed amendments to the Federal Rules of Civil Procedure and the invitation extended to the Bench and Bar to examine them and submit their suggestions and criticism.

It will be remembered that the Enabling Act provides that the Rules must be presented to Congress on the beginning of a regular session and shall not go into effect until after the close of that session. Prompt action is necessary to avoid long delay.

Bar associations and others were invited to submit their reports, criticism and suggestions by September 1. It is reported that many committees have been appointed and are at work. It will be appreciated if they will transmit to the Advisory Committee, Supreme Court Building, Washington 13, D. C., by September 1, all suggestions then ready for consideration. Additional suggestions may be submitted and will be considered if received before final report of the Advisory Committee is submitted to the Court.

The Advisory Committee does not wish to burden the Court with the consideration of amendments for which no real necessity exists. An expression of preference is desired between the various "alternates" contained in the preliminary draft.

REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

Judgments Fraudulently Obtained—Relief by Proceedings Other Than Bill of Review

When a clear case of fraud in the course of soliciting a patent and in prosecuting infringement litigation thereon and an attempt by the patent owner to subvert the administration of justice is brought to the attention of a federal appellate court after the expiration of the normal time for reconsideration of its judgment, that court, in the exercise of its inherent judicial power has the power to, and should, vacate its judgment and remand the cause to the District Court for such further action as may be appropriate. The customary proceeding by bill of review in the District Court is not the exclusive remedy.

Hazel-Atlas Glass Company v. *Hartford-Empire Company; and Shawkee Manufacturing Company, Glenshaw Glass Company, McKee Glass Company, George R. Haub* v. *Hartford-Empire Company*, 88 L. ed. Adv. Ops. 936; 64 Sup. Ct. Rep. 997; U. S. Law Week 4388 and 4396. (No. 398, argued February 9 and 10, decided May 15, 1944).

These are two five-to-four decisions arising out of the same subject matter. Mr. Justice BLACK delivered the opinion of the Court. Mr. Justice ROBERTS submitted a dissenting opinion concurred in by Mr. Justice REED and Mr. Justice FRANKFURTER. The CHIEF JUSTICE also dissented but concurred only in "the result suggested" in the dissenting opinion.

Space does not permit a full statement of the circumstances out of which these decisions emerged. For present purposes it will have to suffice to state that certain conduct on the part of those interested in procuring the patent in question was regarded by the majority opinion, and apparently concurred in also by the dissenting opinion, as constituting a fraud upon the United States Patent Office in the procurement of the patent; and that those circumstances, supplemented by further conduct before the courts in litigation upon that patent, constituted a fraud upon the courts and an attempt to subvert the administration of justice.

The Supreme Court accordingly held, by the majority opinion, in reversing a two-to-one decision of the Circuit Court of Appeals, Third Circuit, that the Court of Appeals, upon petition and supporting affidavits setting forth the circumstances in question, should have vacated the judgments entered by that court in these two cases some ten years earlier, in which judgments the patent in question had been held valid and infringed; and that the District Court should be instructed to set aside its judgments of validity and infringement and to take such further action as would appear necessary and appropriate.

The dissenting opinion, while apparently not questioning the factual premises on which the majority acted, and recognizing that "the temptation might be strong to break new ground in this case" if the petitioners "were otherwise remediless" insisted that there was an established procedure for such situations as was here presented, viz.:

> . . . a suit in equity in the District Court to set aside or amend the judgment. Such a proceeding is required by settled federal law and would be tried, as it should be, in open court with living witnesses instead of through the unsatisfactory method of affidavits . . .

That being the established procedure, the dissenting opinion urged, "respect for orderly methods of procedure is especially important in a case of this sort," particularly where, as here, there was serious question as to the standing of the petitioners to maintain any proceeding for the relief sought, in view of their own prior knowledge and possible acquiescence if not actual participation in, and acceptance of the benefits of, the alleged iniquitous conduct. These "serious controverted issues" ought not to be resolved in this summary procedure, said the dissenting opinion.

The majority opinion did not regard the standing of the petitioners as material to the problem presented. Where, as here, a litigant was seeking to misuse the patent monopoly and has been guilty of tampering with the administration of justice, the public interest is paramount and the standing of the parties calling these matters to the attention of the courts was not of controlling significance.

As to the procedural question, the majority opinion recognized that "customarily" the mode of remedy in these situations was that pointed out by the dissenting opinion; but the majority insisted that the power lay in the courts, not in the procedure by which that power had been brought into action. Where the underlying situation was so clear as that opinion, and as even the dissenting opinion appears to have regarded it, the majority opinion was clearly impressed with the thought that the procedural objection was only as to ceremony and not substance.

Too often has the judicial power unnecessarily fettered itself, to its own detriment and to the injury of the public, with the response that "we think you're entitled to relief but you've adopted the wrong remedy." Simplification of our ponderous court procedures is commendable even if in doing so, precedent is discarded. The principle of summary judgment proceedings has recently been recognized as a progressive step in the

* ASSISTED by JAMES L. HOMIRE and IRWIN H. FAIRCHILD (patent case).

modernization of our federal procedure (Rule 56). But as also recognized in the utilization of this procedural implement, where there are serious questions of fact and inferences to be drawn therefrom the matter should not be disposed of by affidavits and counter affidavits and accordingly summary judgment procedure should not be entertained in such situations. (See Rule 56 (c) and (d); and cases thereunder). Here, perhaps, is the fundamental test of the propriety of these divergent conclusions in the cases here reported.

Here perhaps, also, may be an explanation of the silent dissent of the CHIEF JUSTICE. It may be that he was unwilling to concur, on this summary showing, in the positive factual conclusions on which the Court grounded its action and in which even the dissenting opinion appears to have concurred. Only an examination of the record will reveal the fundamental propriety in making, or refusing to make, the positive factual conclusions on which these cases were decided.

No. 398 was argued by Mr. Stephen H. Philbin for Hazel-Atlas Glass Co., and by Mr. Francis W. Cole for Hartford-Empire Co., and No. 423 by Mr. William B. Jaspert for Shawkee Manufacturing Co., et al., and by Mr. Francis W. Cole for Hartford-Empire Co.

Evidence—Self-Crimination—Use of the Mails to Defraud

The provisions of the Fourth and Fifth Amendments against self-crimination do not apply to the use in the federal tribunals of testimony taken in state courts under a state statute which compels disclosure but grants immunity from state prosecution for acts so disclosed. The immunity granted by those amendments is from prosecution for federal offenses, disclosed under the compulsion of the federal tribunals.

Feldman v. *U. S.*, 88 L. ed. Adv. Ops. 1046; 64 Sup. Ct. Rep. 1082; U. S. Law Week 4420. (No. 193, argued December 17, 1943, decided May 29, 1944).

The accused was indicted for using the mails to further a fraudulent scheme. His conviction was affirmed by the Circuit Court of Appeals, one judge dissenting. The case was brought to the Supreme Court by certiorari to consider the single question whether the admission of testimony previously given by the accused in supplementary proceedings in a state court deprived him of the protection of the Fifth Amendment against being "compelled in any criminal case to be a witness against himself." The judgment of conviction was affirmed.

Pursuant to New York procedure, known as supplementary proceedings, the accused was called as a witness on several occasions between March 31, 1936, and September 29, 1939. The New York immunity statute merely provided that a debtor might not be excused from testifying because of self-crimination but that his testimony could not be used in evidence in a subsequent criminal proceeding against him. By an Act of March 14, 1938, New York broadened the debtor's immunity so as to free him from prosecution because of any matter revealed in his testimony. While the earlier provision was in effect, the accused testified that he was unemployed, paid his rent from funds supplied by his family, owed about $340,000 and contemplated immediate bankruptcy; that once a month his father sent him a book of signed checks and large sums of money which he used to cover checks cashed earlier.

The federal charge was the use of the mails in a scheme to defraud executed by "kiting" checks. In the trial, the Government introduced Feldman's testimony in the New York supplementary proceedings. He did not take the stand.

The opinon of the Court was delivered by Mr. Justice FRANKFURTER. Opening the discussion of the rules of law involved, Mr. Justice FRANKFURTER says:

> We put to one side all these subtler issues because we think they cannot dispose of the case. And so we come directly to the main question, namely whether the Fifth Amendment prohibited the admission against Feldman upon his trial in a federal court of the earlier testimony given by him in the state courts. While the point has not been formally decided, we deem the answer to be controlled by a long series of decisions expressing basic principles of our federation.
>
> The effective enforcement of a well designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed. We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are and expressing as they do supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy. "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles [of the Fourth and Fifth Amendments] established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."
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> But for more than one hundred years, ever since *Barron* v. *Baltimore*, 7 Pet. 243, one of the settled principles of our Constitution has been that these Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit. . . . Conversely, a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere. The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system, howsoever complicated and difficult the practical accommodations to it may be. The matter was put in classic terms in what Chief Justice Taft called "the great judgment," . . . of Chief Justice Taney in *Ableman* v. *Booth*, 21 How. 506, 516: "the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a

state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye.

Declaring that this principle had governed a series of decisions which for all practical purposes covers this case, Mr. Justice FRANKFURTER proceeds to examine the applicable statutes and decisions and says:

> The Constitution prohibits an invasion of privacy only in proceedings over which the Government has control. . . . The Government here is not seeking to benefit by evidence which it extorted. It had no power either to compel testimony in the state court or to forestall such disclosure as a means of avoiding possible interference with the enforcement of the federal penal code. Whether testimony in a New York court should be compelled in exchange for immunity from prosecution under the penal laws of New York is for New York to say. For what purposes the United States may deem the disclosure of testimony more important than prosecution for federal crimes is for Congress to say. It has seen fit to make the exchange very sparingly. . . . Certainly it is not for New York to determine when, because it suits its local policy to employ testimonial compulsion, it will relieve from federal prosecution "for or on account of any transaction, matter or thing concerning which" a New York court may have seen fit to require testimony. Such would be the practical result of sustaining petitioner's claim. The immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction. Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court, quite beyond the reach even of the most alert watchfulness by law officers of the Government.

Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK delivered a dissenting opinion in which Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE joined. *Boyd* v. *United States, Betts* v. *Brady,* and *McNabb* v. *United States* are quoted with approval and of those cases Mr. Justice BLACK says:

> . . . I do not base my dissent upon judicially defined concepts of procedural due process or upon judge-made rules of evidence. The Bill of Rights, proposed in 1789 by the First Congress convened under our Constitution, and quickly ratified by the States in 1791, declares in part that, "No person . . . shall be compelled in any Criminal Case to be a witness against himself." Amend. V, Constitution of the United States. Never since the Bill of Rights was adopted, until today, has this Court sustained a single conviction for a federal offense which rested on self-incriminatory testimony forced from the accused. I cannot agree to do so now.
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> . . . As the Fifth Amendment heretofore has been interpreted, Feldman's testimony could not have been used for this purpose had it been compelled by a federal court rather than the state court. This would have been true whether the federal court proceeding had been non-criminal or criminal, and whether Feldman had testified as a mere witness or as a defendant. Nor could his forced testimony have been used had it been compelled by federal officers outside of a court room; by foreign detectives in a foreign country inquiring into commission of an offense against the United States committed on the high seas; or by state officers interrogating a suspect for the purpose of enforcing a federal law.
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> Today, however, the Court adopts a different approach to the task of construing the Fifth Amendment. We are now told that under certain circumstances compelled testimony is purged of the fatal taint which the Fifth Amendment places upon it, and that an accused can be convicted in a federal court on words he was forced to speak.
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> . . . Surely such a holding is not to be justified by the language of that Amendment. Within its sweeping probibition are found no exceptions based upon the persons who compel, their purpose in compelling, or their method of compelling, whether by threats of imprisonment, physical torture, or other means. Testimony is no less compelled because a state rather than a federal officer compels it, or because the state officer appears to be primarily interested at the moment in enforcing a state rather than a federal law.
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> It is impossible for me to reconcile today's restrictive interpretation of the prohibition against compelled self-incrimination with the principle of broad construction which this Court heretofore has deemed essential to full preservation of the basic safeguards of liberty specifically enumerated in the Bill of Rights. The protections explicitly afforded the individual by the Bill of Rights represent a large part of the characteristics which distinguish free from totalitarian government. Under our Constitutional system the privileges it embodies and the rights it secures were intended to be above and beyond the power of any branch of government to mutilate or destroy. We have no assurance that the fears of those who drafted and adopted our Bill of Rights were groundless, nor that the reasons for those fears no longer exist. Ancient evils historically associated with the possession of unqualified power to impose criminal punishment on individuals have a dangerous habit of reappearing when tried safeguards are removed.

The case was argued by Mr. Seymour M. Klein for Feldman and by Mr. Chester T. Lane for the Government.

Appellate Procedure—Review of Questions of Local Law

In a judicial proceeding instituted in the insular courts of Puerto Rico involving questions of insular law, the review by the federal courts of the decisions of the local courts of our insular possessions in matters of peculiarly local concern should leave appropriate scope for the development by the courts of a system of law suitable to local customs and needs.

Carlos M. DeCastro v. *Board of Commissioners of San Juan,* 88 L. ed. Adv. Ops. 1035; 64 Sup. Ct. Rep. 1121; U. S. Law Week 4431. (No. 349, argued April 24, decided May 29, 1944).

This proceeding was instituted in the District Court of San Juan, Puerto Rico, to review the action of the Board of Commissioners of the City of San Juan in removing from office the city manager appointed by that Board. The District Court of San Juan sustained the Board. The Supreme Court of Puerto Rico reversed the insular District Court and directed that the city manager be reinstated. On appeal to the Court of Appeals, First Circuit, that court affirmed and the Supreme Court of the United States denied certiorari.

On the remand the Supreme Court of Puerto Rico, on motion of the Board of Commissioners, stayed execution of its first judgment insofar as it ordered rein-

statement, on the ground that the term of office had expired after the decision of the Court of Appeals on the first appeal. The insular court concluded that the tenure of office of the city manager was four years, if the city manager during that period observed good behavior. On appeal the Circuit Court of Appeals affirmed and the Supreme Court granted certiorari because serious questions had been raised in respect to the appropriate rule governing decision of cases involving local laws brought from the insular courts of Puerto Rico for review by the Court of Appeals and by the Supreme Court. The judgment of the Circuit Court of Appeals was affirmed.

Mr. Chief Justice STONE delivered the opinion of the Court. After commenting on the grounds for the decision by the Court of Appeals and reviewing and interpreting prior decisions, he says:

> Our opinion in the *Bonet* case was the culmination of efforts by this Court, . . . to insure a review by the federal courts of decisions of the local courts of our insular possessions in matters of peculiarly local concern which should leave appropriate scope for the development by those courts of a system of law which differing from our own in its origins and principles, would nevertheless be suitable to local customs and needs.
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> From the beginning we have recognized that the appellate review of insular cases was not given to the federal courts for the purpose of superimposing upon the Spanish law our common law preconceptions, except so far as that law must yield to the expressed will of the United States. . . . Hence we have emphasized as a cardinal principle of review in such cases that the mere fact that our own system of law and statutory construction would call for the application of one rule to a given set of facts, does not preclude the adoption of a different one by the insular courts. . . . If the rule thus announced by the insular court is one which is not plainly inconsistent with established principles of the local law, or in their absence is one accepted by the practice of the community, it will not be rejected here merely because it is not in logical harmony with the rules which we would apply to a community within the United States. It will be rejected only on a clear showing that the rule applied by the local court does violence to recognized principles of local law or established practices of the local community.
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> Repeated admonitions that in cases coming from the Puerto Rican insular courts to the federal courts for review, where the Constitution or statutes of the United States were not involved, great deference must be paid to local decisions, having failed of their purpose, . . . see *Bonet* v. *Yabucoa Sugar Co.*, 306 U. S. 505, we restated them in more emphatic form in *Bonet* v. *Texas Company, supra*, 470, in the sentence quoted in the opinion below which we have repeated here. In order that its true purport might not be misunderstood we accompanied the sentence by the statement of Mr. Justice Holmes in *Diaz* v. *Gonzales*, . . . which we have quoted, and in the light of that exposition we added: "Such a judgment of reversal [by the Circuit Court of Appeals] would not be sustained here even though we felt that of several interpretations that of the Circuit Court of Appeals was the most reasonable one."
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> Thus interpreted and read in its context the principle, as restated in the *Bonet* case, that to justify reversal by the federal courts of a decision of an insular supreme court in a matter of local concern, "the error must be clear or manifest; the interpretation must be inescapably wrong," is not a mere mechanical device which requires or admits, save in exceptional cases, of the summary disposition of appeals from that court. Nor does it minimize the importance or dignity of the appellate function in such cases. On the contrary, we think that it imposes on the Court of Appeals and on this Court the peculiarly delicate task of examining and appraising the local law in its setting, with the sympathetic disposition to safeguard in matters of local concern the adaptability of the law to local practices and needs. It is one which ordinarly cannot be performed summarily or without full argument and examination of the legal questions involved. But if in the light of such an examination it is found that the rule adopted by the local tribunal is an intelligible one, not shown to be out of harmony with local law or practice, it is not to be rejected because we think a better could have been devised or because we find it out of harmony with our own traditional system of law and statutory construction.
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> There remains for consideration the appropriate application of these principles to the facts of the present case.

Here the CHIEF JUSTICE reviews the legislative history of the Puerto Rican statutes applicable to the controversy, examines its Civil Service Act, analyzes the local decisions and those of the United States courts, and concludes as follows:

> In view of these considerations and of the principles long observed by this Court in reviewing decisions of the insular courts, which we have stated, we cannot say that we should not defer to the view of the Supreme Court of Puerto Rico that the meaning of § 21, when examined with the related provisions of Act No. 99, in the light of the prevailing practical construction of it, is not so plain and unambiguous as to preclude resort to extrinsic aids to interpretation. Nor can we say, that the practical construction given the Act, together with the strong presumption against life tenures, and the principle, accepted by the Supreme Court of Puerto Rico on the authority of numerous American decisions, that ambiguities should be resolved in favor of the shorter term of office, were clearly insufficient to support the construction which it adopted.

The case was argued by Mr. William Cattron Rigby for DeCastro and by Mr. F. Fernandez Cuyar for Board of Commissioners.

Appellate Procedure—Rule 39 (b)—Court of Appeals for the First Circuit

Mario Mercado e Hijos v. *Commins*, 88 L. ed. Adv. Ops. 1043; 64 Sup. Ct. Rep. 1118; U. S. Law Week 4434. (No. 497, argued and submitted April 24, decided May 29, 1944).

This is a companion case to *DeCastro* v. *Board of Commissioners*, involving the validity of Rule 39 (b) of the Court of Appeals for the First Circuit, which authorizes the summary dismissal or affirmance of judgments appealed from the Supreme Court of Puerto Rico

involving only questions of local law, unless it appears from the record and appellant's required "statement on appeal," that the judgment appealed from "is 'inescapably wrong' or 'patently erroneous.'"

The questions of local law here involved were as to the validity of an option of purchase of a plantation, the consequence of a sale in disregard of the option, and the rights and responsibilities of the various parties.

Mr. Chief Justice STONE delivered the opinion of the Court and says:

> In affirming the judgment of the Ponce District Court which denied the petition for cancellation of the conveyance, the Supreme Court of Puerto Rico rested its decision on two independent grounds, either one of which, if supportable, is sufficient to sustain it.

The grounds upon which the local court based its decision are examined and applicable decisions are analyzed, and the CHIEF JUSTICE says:

> Petitioner has furnished us with no persuasive evidence that the law is otherwise in Puerto Rico. On the contrary the Puerto Rican Supreme Court's decision that the option was necessarily assigned with the mortgage is not without support in the statutory provisions which it cited, and to which we have referred.
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> As we have said in the *DeCastro* case, the duty of the Court of Appeals and of this Court to examine and appraise local law in cases brought for review from the insular courts cannot ordinarily be discharged summarily. But full argument in this case has not developed any issue of Puerto Rican law, or any question of the deference rightly to be paid to the decisions of the highest court of Puerto Rico, so substantial as to preclude the summary disposition made of this case by the Court of Appeals.

The case was argued by Mr. William Cattron Rigby and Mr. Pedro M. Porrata for the plantation corporation and submitted by Mr. Celestino Dominquez Rubio for Commins.

American Citizenship—Judicial Proceedings for Cancellation of Citizenship on the Ground of Fraudulent Misrepresentation

In a proceeding to set aside a naturalization certificate because of alleged fraud and illegal procurement, the evidence must be so "clear, unequivocal and convincing" as not to leave "the issue in doubt."

Baumgartner v. *U. S.*, 88 L. ed. Adv. Ops. 1155; 64 Sup. Ct. Rep. 1240; U. S. Law Week 4473. (No. 493, argued April 26, decided June 12, 1944).

On September 26, 1932, the United States District Court, Western District of Missouri, entered an order admitting Carl Wilhelm Baumgartner to citizenship and issued a certificate of naturalization to him. Almost ten years later suit was brought to set aside the naturalization decree and to cancel the certificate. The District Court entered a decree in favor of the Government. That decree was affirmed by the Circuit Court of Appeals, Eighth Circuit, one judge dissenting. The case was taken to the Supreme Court by certiorari and the judgments of the lower courts were reversed.

On the original application for admission to citizenship Baumgartner declared on oath that he renounced his allegiance to the German Reich and would "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic," and that he would "bear true faith and allegiance to the same." The Government claimed that he did not truly and fully renounce his allegiance to Germany and that he did not intend to support the laws of the United States and give its government true faith and allegiance. The basis for the forfeiture of his citizenship was fraud and illegality in its procurement.

The opinion of the Court was delivered by Mr. Justice FRANKFURTER. He first takes up a review of the evidence bearing on the issue of fraudulent intent, the most important points of which may be summarized as follows:

Baumgartner was born in Kiel, Germany, on January 20, 1895. On completion of his high school education, he entered the German army in 1914. He was commissioned a second lieutenant in 1917, and shortly thereafter was captured by the British and confined in England until November, 1919. He then returned to Germany, studied at the University of Darmstadt and graduated as an electrical engineer. He came to the United States in 1927 and his wife followed him later in the same year. He soon found employment in a Missouri public utility company and continued that employment until the beginning of this proceeding. He spoke admiringly of the German schools, of the German system of government, the virtues of Hitler and of his movement, the superiority of the German people, and the German engineering work to such an extent that he aroused antagonism among his co-workers and was transferred to a different section of the plant. He made speeches before citizens' committees, beginning in 1934, in which he said that Nazi regimentation was superior to democracy. One witness of German extraction testified that Baumgartner told him that he [the witness] was "a traitor to my [the accused's] country" because of the witness's condemnation of Hitler. There was testimony that Baumgartner justified the German invasions in the late 1930's and when Dunkerque fell said, "Today I am rejoicing." Another witness testified that Baumgartner told him that he [Baumgartner] belonged to an order called the "Bund." Baumgartner's diary, kept from December 1, 1939, to the summer of 1941, reveals that he attended a meeting of the German Vocational League where the German national anthem was sung and "everyone naturally arose and assumed the usual German stance with the arm extended to give the National Socialist greeting." Other diary entries reflect "violent anti-semitism, impatience at the lack of pro-German militancy of German-Americans, and approval of Germans who have not 'been Americanized, that is, ruined.'" The trial judge asked Baumgartner, "was your attitude towards the principles of the American government in 1932 when you took the oath the same

as it has been ever since?", to which Baumgartner replied in the affirmative. After the review of the evidence, which has here been sharply condensed, Mr. Justice FRANKFURTER says:

> That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration. In reaffirming its importance we mean to pay more than lip service. But the rule does not relieve us of the task of examining the foundation for findings in a particular case. The measure of proof requisite to denaturalize a citizen was before this Court in *Schneiderman* v. *United States*, 320 U. S. 118. It was there held that proof to bring about a loss of citizenship must be clear and unequivocal. We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen.
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> The gravamen of the Government's complaint and of the findings and opinions below is that Baumgartner consciously withheld allegiance to the United States and its Constitution and laws; in short, that Baumgartner was guilty of fraud. To prove such intentional misrepresentation evidence calculated to establish only the objective falsity of Baumgartner's oath was adduced. Nothing else was offered to show that Baumgartner was aware of a conflict between his views and the new political allegiance he assumed. But even if objective falsity as against perjurious falsity of the oath is to be deemed sufficient under § 338 (a) of the Nationality Act of 1940 to revoke an admission to citizenship, it is our view that the evidence does not measure up to the standard of proof which must be applied to this case. . . . One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation. Our trust in the good sense of the people on deliberate reflection goes deep. For such is the contradictoriness of the human mind that the expression of views which may collide with cherished American ideals does not necessarily prove want of devotion to the Nation. It would be foolish to deny that even blatant intolerance toward some of the presuppositions of the democratic faith may not imply rooted disbelief in our system of government.
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> The denial of application for citizenship because the judicial mind has not been satisfied that the test of allegiance has been met, presents a problem very different from the revocation of the naturalization certificate once admission to the community of American citizenship has been decreed.
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> It is idle to try to capture and confine the spirit of this requirement of proof within any fixed form of words. The exercise of our judgment is of course not at large. We are fully mindful that due observance of the law governing the grant of citizenship to aliens touches the very well-being of the Nation. Nothing that we are now deciding is intended to weaken in the slightest the alertness with which admission to American citizenship should be safeguarded. But we must be equally watchful that citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that citizenship was disloyally acquired.
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> . . . Whatever German political leanings Baumgartner had in 1932, they were to Hitler and Hitlerism, certainly not to the Weimar Republic. Hitler did not come to power until after Baumgartner forswore his allegiance to the then German nation.

Coming to his final conclusion, Mr. Justice FRANKFURTER says:

> And so we conclude that the evidence as to Baumgartner's attitude after 1932 affords insufficient proof that in 1932 he had knowing reservations in forswearing his allegiance to the Weimar Republic and embracing allegiance to this country so as to warrant the infliction of the grave consequences involved in making an alien out of a man ten years after he was admitted to citizenship. The evidence in the record before us is not sufficiently compelling to require that we penalize a naturalized citizen for the expression of silly or even sinister-sounding views which native-born citizens utter with impunity. The judgment must accordingly be reversed and the case remanded to the District Court for further proceedings not inconsistent with this opinion.

Mr. Justice MURPHY wrote a separate opinion in which Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE joined. It reaches the same conclusion by a somewhat different road and buttresses the final conclusion on recent decisions of the Court. Opening the opinion, Mr. Justice MURPHY says:

> The issue in this case is clear. The Government has sought to set aside petitioner's naturalization certificate because of alleged fraudulent and illegal procurement. It was thus incumbent on the Government to meet the standard of proof laid down by this Court in *Schneiderman* v. *United States*, 320 U. S. 118, 125, 158, by presenting evidence of a "clear, unequivocal, and convincing" character which did not leave "the issue in doubt" as to whether petitioner fraudulently or illegally procured his certificate.

The opinion then proceeds to consider the *Schneiderman* case, of which Mr. Justice MURPHY says:

> . . . The decision in the *Schneiderman* case was not merely a decision of an isolated case. It was a formulation by a majority of the Court of a rule of law governing all denaturalization proceedings. That rule of law is equally applicable whether the citizen against whom the proceeding is brought is a Communist, a Nazi or a follower of any other political faith. This requirement of proof was recognized by the court below, 138 F. 2nd 29, 34, and by both the Government and the petitioner before us.

Commenting on the absence of "clear, unequivocal and convincing" evidence that the naturalization certificate was fraudulently or illegally procured, Mr. Justice MURPHY says:

> American citizenship is not a right granted on a condition subsequent that the naturalized citizen refrain in the future from uttering any remark or adopting an attitude favorable to his original homeland or those there in power, no matter how distasteful such conduct may be to most of us. He is not required to imprison himself in an intellectual or spiritual straightjacket; nor is he obliged to retain a static mental attitude.

* * *

. . . The naturalized citizen has as much right as the natural born citizen to exercise the cherished freedoms of speech, press and religion, and without "clear, unequivocal, and convincing" proof that he did not bear or swear true allegiance to the United States at the time of naturalization he cannot be denaturalized. Proper realization of that principle makes clear the error of setting aside petitioner's naturalization certificate on the basis of the facts adduced in this proceeding.

The case was argued by Mr. Harold Evans for Baumgartner and by Mr. Solicitor General Fahy for the Government.

Federal Indian Law—Partition of Restricted Indian Land —United States a Necessary Party

United States v. *Hellard*, 88 L. ed. Adv. Ops. 929; 64 Sup. Ct. Rep. 985; U. S. Law Week 4369. (No. 648, argued April 28, decided May 15, 1944).

A full-blood Creek Indian died leaving heirs of the full blood, who inherited certain lands from her subject to restrictions on alienations by her and her heirs. By an Act of June 14, 1918, Congress made such lands subject to the laws of Oklahoma providing for partition of real estate. By Act of April 12, 1926, Congress provided for service upon the Superintendent for the Five Civilized Tribes of notice of any suit to which a restricted member or restricted heirs or grantees are parties where the suit involves lands allotted to a citizen of the Five Civilized Tribes.

The heirs in this case sued in an Oklahoma state court for partition of the lands, in 1940. The United States was not a party; and no notice of the suit was served on the Superintendent. Judgment of partition was entered and the lands were sold to Hellard who received a sheriff's deed. In 1941 Hellard brought suit in the same court against the Indian heirs to quiet his title. The suit was removed to the federal District Court and the United States answered, asserting that the partition proceedings were void for lack of the United States as a party and for want of service on the Superintendent, as required by the Act of 1926. The District Court held that the partition proceedings were valid and quieted title in Hellard; and the Circuit Court of Appeals affirmed.

On certiorari the judgment was reversed by the Supreme Court in an opinion by Mr. Justice DOUGLAS. The opinion stresses the fact that restricted Indian land is property in which the United States has an interest, and that the governmental interest throughout the partition proceedings is as clear as if the United States were vested with the fee. Hence, the United States is a necessary party.

The case was argued by Mr. Marvin J. Sonosky for the Government and by Mr. George H. Jennings for Hellard.

ANNUAL MEETING
CHICAGO, ILLINOIS

September 11-14, 1944

The Sixty-Seventh Annual Meeting of the American Bar Association will be held at Chicago, Illinois, September 11 to 14, 1944. Further information with respect to the meeting will be given in the August and September issues.

Hotel Accommodations

Headquarters—Drake Hotel

Hotel accommodations, *all with private bath*, are available as follows:

	Single for 1 person	Double (dbl. bed) 2 persons	Twin-beds for 2 persons	Two-room suites (parlor and 1 bedroom)
AMBASSADOR (State & Goethe)				$13.20–$16.50
BISMARCK ... (Randolph & LaSalle)			7.50–9.50	
BLACKSTONE (Michigan & Sixth St. So.)	5.50–8.50		7.50–11.00	
DRAKE ... .. (Michigan & Walton)	(Advance reservations have exhausted all space)			
KNICKERBOCKER ... (163 E. Walton)	(Advance reservations have exhausted all space)			
MARYLAND . (900 Rush St.)		4.50	5.00	
MEDINAH CLUB ..... (505 N. Michigan)	3.50–5.00	6.00	6.00–7.00	
SHERMAN ... (Randolph & Clark)	3.85–4.40		5.50–8.00	
STEVENS .... (720 S. Michigan)	4.00	5.50–7.00	7.00–8.00	

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice,** number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

CHARLES DEVENS

Soldier, Jurist and Orator

By GEORGE R. FARNUM
of Boston
Former Assistant Attorney General of the United States

IN the early decades of the eighteenth century an immigrant shipwright, Philip Devens, settled in historic Charlestown, now part of Boston. Of his two sons, Richard adopted the calling of cooper. By dint of energy and astuteness, as he described the ascending curve of his own fortunes, "out of extreme poverty" he "progressed through a mechanical avocation to the opulence of a highly prosperous merchant." He served as ensign in the French and Indian War, and as Commissary General of Massachusetts and as a member of the Committee of Public Safety during the Revolution. He agreed with Paul Revere on the belfry signals which started the latter upon his epochal ride to Lexington and Concord. He supervised the construction of the old Charlestown bridge, the first ever built in America, which was opened amid "the greatest splendor and festivity" on the eleventh anniversary of the Battle of Bunker Hill. A silver tankard, given him in recognition of these last services, was one the prized possessions of his great grandson.

Richard married twice. Of his eleven offspring by his first wife, his second, David, born in December 1747, emulated his father both in his success as a merchant and in the prolific fruits of his marriage. Of his ten children, the last, Charles, was ushered into the world at Charlestown in March, 1791. He inherited his ancestors' talents for business. The oldest of his four children —the subject of this sketch—was born in the ancestral community on April 4, 1820, and was given the name of his father.

His education was the best that New England could offer. He studied at the famous Boston Latin School. From there he entered Harvard at the age of fourteen. A half a century later, in the course of an address as president of the alumni on the two hundred and fiftieth anniversary of the founding of the college, and with an appreciation of what his student days had meant to him, he paid tribute to that idealistic spirit of his alma mater "in [her] attempt," as he put it, "to establish the foundations of that noble and high character which makes useful men able in their own persons to exhibit exalted lives."

Choosing the law as a career he prepared himself at the Harvard Law School, graduating in 1840 at the age of twenty. Shortly thereafter he passed the Bar. Deciding to launch his professional life in a small community, he moved to Franklin County in western Massachusetts and opened an office, first in Northfield and afterwards in Greenfield. In 1848 he was elected to the Massachusetts Senate and reelected the following year. Then followed four years as United States marshal, at the end of which he removed to Worcester, where he resumed the practice of law in partnership with George F. Hoar.

Here he quickly earned the reputation as one of the most billiant advocates at the Bar of his state. Senator Hoar said of him, "The certainty of the absolute fidelity, thoroughness, and skill with which his part of the duty of an important trial would be performed made it a delight to try cases as his associate." His impressive appearance and stately manner greatly added to his effectiveness. Gifted with a fine voice, a lively imagination and a masterly command of English, he was particularly effective before juries. In eulogizing Governor Bullock, Devens said that which could be justly applied to himself, "He had, above all, the temperament of an orator; never thinking of himself, but engrossed by those whom he was addressing, his own moods responded to theirs, and he led them the way he desired by the force of his own emotions." Of the radiant beauty and stirring power of his oratory when deeply moved, no better example can be given than his memorable tribute to Abraham Lincoln—

> In the older Scriptures the stately figure of the great Hebrew law-giver and warrior stands on the lonely hill in the land of Moab to gaze out over the Promised Land, which it is decreed he shall never enter. Fair before him stretch the fertile fields, yet no crops from them shall ever fill his garners. The sparkling waters dance in the sunlight, yet no draught from them shall ever refresh his weary lips. He has crossed at the head of the children of Israel the stormy waters of the Red Sea; he has led them through the forty years of wandering in the wilderness. For them the hour of enjoyment has come. His work is done; for him it remains but to rest in his lonely grave. So to this our Moses, who had led us through the Red Sea of Rebellion, is vouchsafed but a glimpse of the Promised Land, as he passes from mortal sight forever.
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> "Beautiful upon the mountains," says the prophet Isaiah, "are the feet of him that bringeth good tidings." Yet as the messengers approach we see that their countenances are grave, that their garments are worn, that their feet are torn by the flinty way; but beautiful are they still for the glad tidings which they bear. And as in imagination there rises again before us the tall figure of Abraham Lincoln, not graceful according to the rules of classic art, yet not without its own simple majesty; as we behold again that rugged countenance, deep graven with the lines of princely care—we see it illumined with a nobler light than the cunning hand of the Greek could give to the massive brow

This is the twentieth in a series of biographical studies of eminent soldier-lawyers written by Mr. Farnum for the JOURNAL.

of the Olympian Jupiter; beautiful in the radiance of truth and justice, while the scroll that he holds in his right hand bears the glad tidings of liberty to all men.

Devens early displayed a keen interest in military affairs and was active in the state militia. By successive promotions he had attained the rank of brigadier general at the outbreak of the Civil War. When the news of Lincoln's call for volunteers reached Worcester, he was engaged in the trial of a case. He immediately requested associate counsel to take over his brief and he went directly from the court house to the local armory and offered his services to his country. Before nightfall he was enrolled in the Third Battalion of Massachusetts Rifles and chosen its major, and five days later he was on his way South. His first station was at Fort McHenry, of "The Star Spangled Banner" fame. In July he was commissioned colonel of the Fifteenth Massachusetts Regiment.

His command was engaged in the disastrous melee at Ball's Bluff. Struck by a bullet in the breast, he was saved from death by a metallic button on his uniform, and only escaped capture by swimming the Potomac to Harrison Island. Parenthetically, Lieut. Oliver Wendell Holmes of the Twentieth Massachusetts was severely wounded in the same encounter. In the spring of 1862 Devens was elevated to brigadier general of Volunteers.

During the first day of the bloody encounter at Fair Oaks he was wounded again but remained on the field until nightfall. The severity of his injuries kept him out of the balance of the fighting on the Peninsula. In December he was back at the front and commanded advance units at Fredericksburg. The following May he was in the thick of the engagement at Chancellorsville and added another wound to his honorable score. In June, 1864, he participated in the battle of Cold Harbor, though so crippled with inflammatory rheumatism that he had to be borne along the lines on a stretcher.

To Devens fell the assignment of leading the first federal troops into Richmond. Just a quarter of a century later he recalled Lincoln's entry into the fallen capital. "It was my good fortune," he reminisced, "to ride side by side with him in the headquarter's army wagon which conveyed him through the streets of that city so long the citadel of the Confederacy. He seemed weary and tired, graver than I had ever seen him, less rejoicing in the triumph that had been won than anxious about the new problems looming up before him. It may be that I interpret the recollections of that hour in the baleful light of the dreadful tragedy that so soon followed, yet, as I recall it, he seemed to me like one who felt that his life's work was done, and who would willingly rest from his labors, that his works might follow him."

At the close of the war Devens remained second in command to General Sickles in charge of the southeastern department until June, 1866, when, declining a commission in the regular army, he returned to civil life. Throughout those terrible years of fraternal conflict he had proved himself "the essential type of the citizen soldier and the soldier gentleman." The heroic memories of those great years were to remain with him until the end as a source of strength and inspiration. Philosophizing, when an old man, on the lessons of the war, he declared, "When we consider how little adapted the education of the American citizen is to that system of discipline which is intended to make the soldier a machine, in order that the physical strength and the power of thousands may be wielded by the will of one alone; when we remember how prone we all of us are to criticize the acts of others or their orders and directions,—we realize how difficult it must have been to yield that unquestioning obedience which is the necessary rule of the military service. Yet how generously our men gave their confidence, how nobly they strove, sometimes in disaster, often under the most trying circumstances, to execute the orders they received!" And he added, with the humility of one who knew from experience, "To one who held any command the wish must often have come that he could have led them better and done fuller justice to their merits."

This man, who never married, was profoundly moved by the distressing role of women in war. Years after the struggle he admonished an audience in these deeply understanding words—"Nor ought we to forget the obligations we are under to the women of the country, for the courage they manifested from the beginning to the very close of the struggle. . . . Hard as is the lot, stern as is the duty of the soldier who swings on his knapsack for the weary fields of war, that of the mother who gives up her son, of the wife who gives up her husband, of the maiden who gives up her lover, is harder still; for it is hers only to weep and watch and wait. For him, if there is the danger, there is the stern joy of the conflict; for her, only the long weary hours of sadness and suspense."

On leaving the service Devens returned to Worcester to resume the practice of law. The following year, however, he was appointed to the Superior Court. Six years later he was elevated to the Supreme Judicial Court. Upon the election of President Hayes, he was offered the War portfolio. Due to certain complications which arose in connection with the appointment of the man Hayes had in mind for Attorney General, Devens was persuaded to accept this position instead, and he held it throughout the administration. Of his record Justice Bradley said, "He left upon my mind the impression of a sterling, noble, generous character, loyal to duty, strong, able, and courteous in the fulfillment of it, with such accumulation of legal acquirement and general culture as to render his counsels highly valuable in the Cabinet, and his public efforts exceedingly graceful and effective. His professional exhibitions in the Supreme Court during the four years he represented the Government were characterized by sound learning, chastely and accurately ex-

pressed, great breadth of view, the seizing of strong points and disregard of minute ones, marked deference for the Court and courtesy to his opponents. To the younger members of the Bar he was a model of a courtly and polished advocate."

At the end of the Hayes administration, Devens was reappointed to the Massachusetts Supreme Judicial Court and held that office until his death in 1891. Chief Justice Walbridge Abner Field, in appraising his labors on the Bench, said of him, "His simple, manly character and love of justice and of fair play gave him a deep-seated contempt for fraud and evasion, and not much toleration for subtleties. More and more as he grew older did he take pains to state carefully not only the conventional grounds but the real grounds in morals or expediency on which legal decisions must ultimately be supported. Apparently he thought that the law should be intelligible, and that the reasons on which it rests should be such as the people who must obey the law could understand." However, Senator Hoar, than whom few knew Devens better, declared, "It has always seemed to me that he erred after the war in not preferring political life to his place on the Bench. He could easily have been Governor or Senator, in which places the affection of the people of Massachusetts would have kept him for a period limited only by his own desire, and might well have been expected to pass from Cabinet to an ever higher place in the service of his country," adding of one who had given so many proofs of indomitable will and unflinching courage on the field of battle, "but he disliked political strife, and preferred those places of service which did not compel him to encounter bitter antagonisms."

In his commemorative address on General Grant, delivered at Worcester in 1885, he declared:

> Even if he does not utter them, how well we may imagine the thoughts that pass through his mind as he feels that he draws near to them: "Shall I see them again,—McPherson, Reynolds, and Sedgwick, as they died at the head of their army corps; Rawlins, whom I loved as a brother; Hooker, as when his cannon rang down from among the clouds on Lookout's crest; Thomas, as he triumphed at Nashville; Meade, as he dashed back the fierce charge at Gettysburg or urged to the last dread struggle the everfaithful Army of the Potomac? If it be so, I know they will meet me as comrades and brothers. Nor those alone, not alone the great chiefs who urged forward the fiery onset of mighty battalions. Shall I see again the splendid youth of 1861 as they came in all the ardor of their generous patriotism, in all the fire of their splendid courage, to fill the ranks of our armies? Shall I see them as when through the valleys the battle poured its awful tide, or as when the hills were made red by their glorious sacrifice? I am very near them now. Almost I can behold them, although the light on their faces is that which never was on sea or land. Almost I can hear their bugles call to me, as the notes softly rise and fall across the dark valley through which I must pass. I go to them; and I know there is not one that will not meet me as a father and a friend.

We can well believe that similar memories came flooding back to occupy the thoughts of Devens himself as his own end drew near.

Fort Devens stands today as a fitting memorial to this devoted soldier of the Republic.

Recent Publications

LAW ENFORCEMENT IN COLONIAL NEW YORK, by Julius Goebel, Jr. and T. Raymond Naughton. 1944. New York: The Commonwealth Fund. London: Humphrey Milford, Oxford University Press. Pp. XXXIX, 867. $5.

THE TASK OF LAW, by Roscoe Pound. 1944. Lancaster, Pennsylvania: Franklin and Marshall College.

STUDIES IN THE HISTORY OF THE ENGLISH FEUDAL BARONY, by Sidney Painter (The Johns Hopkins University Studies in Historical and Political Science). 1943. Baltimore: The Johns Hopkins Press. Pp. 211. $2.

HOMICIDE INVESTIGATION, by LeMoyne Snyder. 1944. Springfield, Illinois-Baltimore, Maryland: Charles C. Thomas, Publisher. Pp. XIII, 287. $5.

PRELUDE TO SILENCE—THE END OF THE GERMAN REPUBLIC, by Arnold Brecht. 1944. New York: Oxford University Press. Pp. XXI, 156. $2.

CASES ON LABOR LAW (AMERICAN CASEBOOK SERIES), by Milton Handler. 1944. St. Paul, Minnesota: West Publishing Company. Pp. XXXII, 786.

RUSSIA AND THE PEACE, by Bernard Pares. 1944. New York: The MacMillan Company. Pp. XI, 293. $2.50.

OUR CIVIL LIBERTIES, by Osmond K. Fraenkel. 1944. New York: The Viking Press. Pp. X, 277. $3.

WAR AND THE LAW, Edited by Ernst W. Puttkammer. 1944. Chicago: The University of Chicago Press. Pp. VII, 205. $2.

THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS—1789-1835, by Charles Grove Haines. 1944. Berkeley and Los Angeles: University of California Press. Pp. XIII, 679. $6.

THREE WARS WITH GERMANY, by Admiral Sir Reginald Hall and Amos J. Peaslee. 1944. New York: G. P. Putnam's Sons. Pp. XVII, 309. $3.

WARTIME LABOR RELATIONS, by John H. Mariano. 1944. New York: National Public & Labor Relations Service Bureau, Inc. Pp. 216. $2.75.

PUBLIC AND PRIVATE GOVERNMENT, by Charles Edward Merriam. 1944. New Haven: Yale University Press. London: Humphrey Milford, Oxford University Press. Pp. 78. $1.75.

PRACTISING LAWYER'S GUIDE TO THE CURRENT LAW MAGAZINES

Banking—The Federal Reserve System—Deductibility of "Exchange Charges" and the Collection of Checks at Par: A history and analysis of the considerable controversy waged by and as to the efforts of the Federal Reserve System to collect all checks "at par" and without the deduction of "exchange charges" are narrated in "The Par Clearance Controversy," a leading article in the June issue of the *Virginia Law Review* (Vol. 30—No. 3; pages 361-397), contributed by Walter Wyatt, General Counsel of the Board of Governors of the Federal Reserve System. Mr. Wyatt is able to present, from the point of view of the administrators of the governmental system, an authoritative discussion of the problems. With considerable insight and fairness he discusses in detail the relevant bills now pending in Congress. To those who have to struggle, in one capacity or another, with the deduction of "exchange charges" on checks, here is something which may be worth having in the files. (Address: Virginia Law Review, University of Virginia, Charlottesville, Virginia; price for a single copy: $1.25).

Constitutional Law—Courts of the United States—Powers of the Congress—Special Tribunal for the Trial of "Good Behavior" of the Federal Judges: It was hardly to be expected that the earnest and forceful attack which United States District Judge Merrill E. Otis made upon the Sumners bill so heartily endorsed by both the Assembly and the House of Delegates of the American Bar Association, would remain unanswered, even in the journal which gave it currency ("Neither Force Nor Will"—12 *University of Kansas City Law Review*, 68). In the April-June issue of *The University of Kansas City Law Review* (Vol. XII—No. 2; pages 119-127), Professor G. W. C. Ross, of the University of St. Thomas in St. Paul, Minnesota, makes a well-considered reply as to the constitutionality of the Sumners bill to create a special tribunal and procedures for the trial of charges of acts contrary to "good behavior," on the part of federal judges other than Justices of the Supreme Court. The author's argument from the analogies of English history as to the trial of judges for "misbehavior" leaves less to inference than did Professor Shartel ("Federal Judges—Appointment, Removal, Suspension": 21 *Mich. Law Rev.* 870) or Dean Pegler ("Trial of Good Behavior of Federal Judges": 29 *Va. Law Rev.* 876). His demonstration is factual and cumulative—a truly valuable contribution to the reasoned study of a subject which deserves a high priority in consideration by the Congress when it reconvenes. Professor Ross is of the opinion that removal proceedings, if heard and decided in first instance by such a judicial tribunal as Judge Sumners proposes and would surround with all safeguards, "would be less liable to abuse than impeachment, which is in the hands of the political organs of the government." (Address: The University of Kansas City Law Review, No. 5100 Rockhill Road, Kansas City 4, Missouri; price for a single copy: 75 cents).

Constitutional Law—Impairment of the Obligation of Contracts—"The Supreme Court and Contract Clause": A series of articles, now current in the *Harvard Law Review*, by Professor Robert L. Hale of Columbia Law School, undertakes an exhaustive analysis of Supreme Court decisions on the application of constitutional provisions against the impairment of contractual obligations. The articles are written under a classification of generalized situations and the author's method is largely historical. It is demonstrated, however, that questions first raised by such famous cases as *Ogden* v. *Saunders*, *Satterlee* v. *Mathewson*, *Sturges* v. *Crowninshield* and the *Dartmouth College* case, continue to recur in modern settings such as legislative action with respect to the rights of mortagees, statutes creating retirement plans for public officials, and laws governing tax sales. The first two installments of Professor Hale's study have appeared in the April and May issues of the *Harvard Law Review* (Vol. 57, Nos. 4-5; pages 512-557; 621-674). A third installment will conclude the series. (Address: Harvard Law Review, Gammett House, Cambridge, Massachusetts; price for a single copy: 75 cents).

Contracts—Breach of Contract Caused by War Conditions—"Unrecoverable Losses in War Time Operations": The totality of the nation's war effort and the unprecedented extent of the preemption of industrial processes for war purposes are bound to have an influence on the nation's business long after hostilities cease. One effect most certainly will be in litigation arising out of contracts of which the performance was de-

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Editor's Note: **This department provides a means by which practicing lawyers may find if the current law reviews and other law magazines contain material which may help or interest them, primarily as assistance in their professional work.**

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the JOURNAL will endeavor to supply, at a price to cover the cost plus handling and postage, a planograph or other copy of a current article.

layed or prevented by governmental enforcement of priorities, price ceilings, or other war time restrictions. Donald S. Frey, formerly special counsel to the War Production Board and more recently assistant to Procurement Legal Division of the office of the Under Secretary of the Navy, reviews these questions in the light of the law of contracts, in an article in the April issue of the *Boston University Law Review* (Vol. 24, No. 2; pages 57-79). The article may prove helpful to many lawyers who already are wrestling with the difficult reconciliation of private contractual rights with the exigencies of a nation at war. (Address: Boston University Law Review, 11 Ashburton Place, Boston, Massachusetts; price for a single copy: 70 cents).

Corporations—State Laws—"Missouri Modernizes Her Business Corporation Code": In the April-June issue of *The University of Kansas City Law Review* (Vol. XII—No. 2; pages 89-105), there is a fairly comprehensive statement as to the new General and Business Corporation Act of Missouri, which, with the approval of Governor Forrest Donnell, will go into effect on January 1, 1945. The author is Carson E. Cowherd, who is a member of the Kansas City law firm of Gage, Hillix, Shrader, Hodges, Cowherd, and Phelps, and was during 1942-1943 the chairman of the Kansas City Lawyers Association's Committee which actively took part in the formulation of the new Code. The pragmatic contributor treats briefly the history of the state's former statute and the reasons for its revision. Then he goes into more detail in a statement and explanation of such changes as actually were made. Because of relationship to such matters as were principally in controversy, Mr. Cowherd's interpretation of mooted provisions of the revised Code may be of invaluable assistance to lawyers whose clients may intend to incorporate in Missouri or to continue doing business in a corporate form in that commonwealth. (Address: The University of Kansas City Law Review, No. 5100 Rockhill Road, Kansas City 4, Missouri; price for a single copy: 75 cents).

Eminent Domain—Procedure—"Condemnation Procedure During World War II": An indication of the greatly increased activity of the federal government in acquiring private property for war purposes is found in an article in the *George Washington Law Review* for April (Vol. 12, No. 3, pages 286-301) by Carolyn Royall Burt, formerly attorney for the Lands Division of the Department of Justice, now a special attorney for the Anti-Trust Division of that Department. This article is the first of two, the second to appear in a later issue of the same review. The first article sets forth the statistics concerning condemnation cases during the war years, summarizes the statutory provisions under which the government has acted, and gives the author's observations of experience in this procedural routine. It is indicated that various problems of law as reflected in court decisions will be considered in the second article. The author's approach to these questions is that of a government attorney who is interested primarily in giving a report on the activities of the Department of Justice—a report which may be interesting to attorneys, who have represented the owner of property in a war time condemnation case. (Address: the George Washington Law Review, The George Washington University, Washington, D. C.; price for a single copy: $1.00).

Federal Taxation—Identity of the Taxpayer—Disregard of the Corporate Entity for Tax Purposes: A subject of legal interest and considerable practical importance at this time, concerning the instances when a corporate entity will be disregarded for purposes of federal taxation, is discussed by Richard W. Case, of the Baltimore City Bar, in the June issue of the *Virginia Law Review* (Vol. 30—No. 3; pages 398-434), under the title "Disregard of Corporate Entity in Federal Taxation—The Modern Approach." This angle, recently the subject-matter of at least two controversial decisions by the Supreme Court of the United States, is analyzed in a manner which may be found to be of maximum helpfulness to the practising attorney, both from the point of view of the application of the Internal Revenue Code and the numerous decisions which have dealt with a field in which the quest for tax revenues has run far ahead of traditional concepts of law as to corporate entities. (Address: Virginia Law Review, University of Virginia, Charlottesville, Va.; price for a single copy: $1.25).

Federal Taxation—Taxes Upon the "Transfer" of the Net Estate—Community Property—"Federal Estate Taxation and the Wiener Case" (U. S.): An ably reasoned article which will be of interest and help to lawyers who struggle anywhere with problems of federal estate taxation as to "community property" may be obtained by sending for a copy of the April issue of the *Washington Law Review and State Bar Journal* (Vol. XIX—No. 2; pages 49-71). The authority of this article is enhanced by the fact that the writer, George Donworth, of the Seattle Bar, was appointed a United States District Judge by President Taft in 1909 and served until he resigned in 1912. Judge Donworth's approach to legal problems of "community property" will hardly be regarded as disinterested, as he has been since 1925 the counsel for the Washington State Community Income Tax Committee. He "goes to bat" for maintaining the integrity of state laws, in the "community property states," and comes to grips with the trends in the Supreme Court of the United States. He favors adherence to "the time-honored community property system until it is repealed or modified by the legislature that enacted it." For this plea he cites the support of the Washington State Bar Association, the Attorney-General of Washington State, and the like

officials of at least seven other states. (Address: Washington Law Review, Seattle 5, Washington; price for a single copy: 50 cents).

International Law—Post-War Agreement and Association of the Nations—"National Law and International Order": A provocative and pioneering article under the above-quoted heading is in the *Washington Law Review and State Bar Journal* for April (Vol. XIX—No. 2; pages 72-84). The author is Professor Linden A. Manden, formerly of the University of New Zealand, Professor of Political Science at the University of Washington. His challenging thesis is that "The future of law in this country is dependent upon the solution of the problem of international security and that without this solution we must expect to see a progressive decline in the rule of law and a probably unlimited growth at an increasingly rapid rate of official discretionary power with all of the dangers to national liberty which such a development would entail." The brilliant author makes an impressive argument for his thesis; he maintains that the new international structure, if it is to be genuine and efficacious, "will have an international law which will closely approximate constitutional law," else liberty and the rule of law will be increasingly sacrificed to discretion and arbitrary power, in the United States and other lands. Here is an article which may well be pondered by sincere thinkers who espouse the cause of American aloofness from international association and adjudication, on the ground that the chief concern of American lawyers is "all out" concentration on frontal attack on bureaucracy and administrative absolutism which are fostering the break-down of impartial law and factual justice at home. Professor Manden envisages the contest for law and justice among nations as all a vital part of the people's war for freedom on the home front. Those who do not accept the author's reasoning and conclusions would do well to read them. (Address: Washington Law Review, Seattle 5, Washington; price for a single copy: 50 cents).

Powers of Appointment—"Exclusive and Non-Exclusive Powers and the Illusory Appointment": This often elusive branch of the law was pragmatically treated in many phases by John E. Howe, of the Kentucky State Bar, in the February issue of the *Michigan Law Review* (Vol. 42—No. 4; pages 649-678). The decided cases and trends in the United States and England are analyzed in a manner calculated to be helpful to the lawyer who has to cope with them. (Address: Michigan Law Review, Ann Arbor, Michigan; price for a single copy: $1.00).

Statutes of Limitations—Liens—Special Assessments on Real Estate for Local Improvements—"The Collectibility of Special Assessments More Than Ten Years Delinquent": A notable controversy in the Supreme Court of North Carolina, climaxed by the decision in *Raleigh* v. *Mechanics and Farmers Bank*, 223 N. C. 286 (1943), is trenchantly analyzed in the February issue of the *North Carolina Law Review* (Vol. 22—No. 2; pages 123-145), by Professor Peyton B. Abbott, of the University of North Carolina Law School. The discussion depends chiefly on statutes and decisions of the particular state, and the article is one for the files of North Carolina lawyers; but there is a good deal of material here for those who have similar questions in other jurisdictions. (Address: The North Carolina Law Review, University of North Carolina School of Law, Chapel Hill, North Carolina; price for a single copy: 80 cents).

Taxes—Taxable "Income"—"Taxability of the Government Subsidy": The increased activity of the federal, state and local governments in the financing of what is still termed private enterprise, although operated on governmental terms, has given urgency to the question as to whether or not the government's "subsidy" payments to such operators or ostensible owners are to be treated as "income" to the acquiescent and supposedly favored recipient, within the meaning of what has become an "umbrageous tree of controversy," the Sixteenth Amendment of the Constitution. The many decisions, rulings and opinions as to what constitutes such a "subsidy" and as to its taxability to such recipients as a part of their "income" were brought together in the April issue of the *George Washington Law Review* (Vol. 12—No. 3; pages 245-286), by Lloyd Fletcher, Jr., of the District of Columbia Bar. The discussion centers considerably around *Edwards* v. *Cuba Railroad Co.*, 268 U. S. 628, and the limitations apparently placed on it by subsequent decisions. The recent developments in the Circuit Courts of Appeals, not yet resolved by the Supreme Court, are treated in a manner which might be helpful to more than a few lawyers, here and there, who are still no less confused than their clients, as to what doors have been opened. (Address: The George Washington Law Review, Washington, D. C.; price for a single copy: $1.00).

Trade Agreements—"Administration of the Trade Agreements Act" —"The Future of Trade Agreements" under the Moscow Declaration of the Four Powers: The January issue of the *Wisconsin Law Review* (Vol. 1944—No. 1) was devoted principally to the timely and still uncharted subjects above quoted. Harry C. Hawkins, Director of the Office of Economics in the United States Department of State, wrote of the administration of the Trade Agreements Act as originally enacted in 1934 and renewed for three-year periods in 1937 and 1940 and for two years in 1943. His point of view was naturally favorable to the policy and methods of the State Department and the Committee on Trade Agreements, under the Act. Professor Charles Bunn, of the

University of Wisconsin Law School, stressed in his article on trade agreements, the considerations of law and policy which led him to urge further *reciprocal* reductions of trade barriers. He submitted a draft of a bill, which he would regard as suitable if enacted by the Congress of the United States to further that objective. Just what the two articles add up to, as to the future of international trade relationships, this department has no comptometer which would be of use in determining; but they are worth examining. (Address: Wisconsin Law Review, Madison, Wisconsin; price for a single copy: 75 cents).

Trusts—"An Important Development in the Field of Fiduciary Administration"—The Trend Toward Broader Investment Powers: In the April issue of the *Boston University Law Review* (Vol. XXIV—No. 2; pages 80-92) is a useful article by Mayo A. Shattuck, president of the Massachusetts Bar Association and member of the Board of Bar Examiners of the Commonwealth of Massachusetts under the title quoted above. The dramatic growth of security transactions and fiduciary investments is first traced, from the time of the publication of that well-remembered landmark, the first edition of Augustus Peabody Loring's *A Trustee's Handbook* (1898). The alignment of the states between the New York or "legal list" rule, the American equivalent of the English standard, and the more liberal Massachusetts rule, is given both in historical perspective and in tabular form with full detail of decisions to date. Lawyers in the trust field should find this worth having. The article concludes, hopefully, but none too relevantly, with the model statute prepared by the legislative committee of the Trust Division of the American Bankers Association. (Address: Boston University Law Review, No. 11 Ashburton Place, Boston, Mass.; price for a single copy: 70 cents.)

Trusts—Liabilities of Trustee—"Retention of Its Own Shares by a Corporate Trustee": Professor Austin W. Scott of The Harvard Law School, in the May issue of the *Harvard Law Review* (Vol. 57—No. 5; pages 601-620) considers the dilemma that confronts a bank or trust company which receives, as part of a trust, a block of its own shares. Should the issuer of the stock, acting as trustee, sell those shares; or, if the stock is not sold, does the trustee assume special obligations as to its retention in the trust? The article deals specifically with the decision of the New York Court of Appeals in *City Bank Farmers Trust Co.* v. *Cannon*, 291 N. Y. 125, 51 N. E. (2d) 674 (1943). That court held that except for the consent of the settlor in that case, the retention of the shares in the trust, of which the trustee was the issuer, was a breach that would have subjected the trustee to a surcharge. With the authority of his scholarship in the field, Professor Scott considers the distinction between the purchase of shares by the trustee and the retention of shares in the trust, and the various possibilities under which a trustee might be held free of a surcharge. (Address: Harvard Law Review, Gammett House, Cambridge, Massachusetts; price for a single copy: 75 cents).

Wills—Decedents' Estates—"Why Pennsylvania Restricts Gifts for Masses": A comprehensive article on the above-quoted controversial but practical subject is contributed to the May issue of the *Dickinson Law Review* (Vol. XLVIII—No. 4; pages 179-191), jointly by Kenneth R. O'Brien, a priest of the Archdiocese of Los Angeles, and Daniel E. O'Brien, of the California Bar, who have written extensively on this and related subjects. The absence of restrictions, at common law, on the power of the owner of property to make gifts for Masses is pointed out, along with the absence of specific statutory restriction in Pennsylvania. The limitations placed on gifts for religious or charitable uses, beginning with the Act of April 26, 1855 as amended, by Section 6 of the Wills Act of 1917 as further amended, are analyzed from the interpreting decisions of the Pennsylvania courts, the reasoning of which is assailed in good spirit. Among other things, the different approach and divergent results in the California courts, under what are said to be similar provisions of statute, are presented, as among the bases for a fervent conclusion that "at the earliest possible moment the above series of erroneous decisions by the Pennsylvania judiciary should be re-examined and overruled." (Address: Dickinson Law Review, Carlisle, Pa.; price for a single copy: 75 cents).

INTERNATIONAL JUSTICE

(Continued from Page 442)

order under law to all nations," we cannot do less than to attempt to point out to them what it means, what institutions are necessary, what methods and procedures will be required.

Anarchy the Alternative of Law in International Affairs

The alternative of law is anarchy. If the world is led by suffering to abandon anarchy in international affairs and to choose law instead, I believe the legal profession of the New World will want to help to implement that choice. We now have a great opportunity. We have a serious responsibility. We have a vision of justice among nations according to law.

A great French philosopher once said "Justice without force is impotent, force without justice is tyranny, justice with force is the hope of mankind."

Gentlemen of the Americas: We have in our grasp that hope for a future world which will be a better place to live in; and the toilers of all nations, whether by hand or brain, are looking to the legal profession to lead them and to gain perpetually for them the realization of that hope.

THIRD AND FOURTH CIRCUITS HOLD JUDICIAL CONFERENCES

THE Seventh Annual Judicial Conference of the Third Circuit, held in Atlantic City, June 28 to July 1, brought out one of the most comprehensive discussions of the proposed Federal Rules of Criminal Procedure which has yet been held. Many individual rules were the subject of severe attack; some, such as the alibi rule in its present form, were rejected, although the meeting favored some type of alibi rule; while modifications of others were suggested. Recent changes made by the rules committee were canvassed and diversities in the practice of the various districts in the circuit were brought out. Most of the rules were approved without much discussion and the general sentiment of the group, with some dissent in evidence, was that on the whole the rules in their present form represented a constructive step forward in the administration of criminal justice. The discussion was led by Lieutenant Commander James Robinson, reporter for the Committee, whose comprehensive knowledge and able presentation of the Committee's viewpoint greatly facilitated the thorough consideration which was given them.

The changes in the civil rules proposed by the Supreme Court's Advisory Committee on that subject, were also presented at a session led by United States District Judge Paul C. Leahy of Delaware. The condemnation rule, giving the right to a jury trial in the first instance in all cases, met with strong disapproval, due to the fact that in all three states of the circuit commissioners are now appointed by the court to fix value and there are comparatively few appeals from their awards. Taken as a whole, however, the suggestions of the Civil Rules Committee met with a favorable reception.

The great virtue of these circuit conference discussions of proposed rules was demonstrated to be that the proposals are given the test of their applicability to the particular and individual procedure of each district, and improvements or amendments brought forward in the light of such procedure are thoroughly considered.

Senior Circuit Judge John Biggs, Jr., opened the executive session of the judges on the first day of the meeting by calling on Circuit Justice Owen D. Roberts, of the Supreme Court, who gave a report on the work of the Supreme Court. Assistant Director Elmore Whitehurst, of the Administrative Office of the United States Courts, related the present status of legislation approved by the Conference of Senior Circuit Judges and a report was then made by Circuit Judge Herbert F. Goodrich for the Circuit Court of Appeals and by the senior district judge of each district court concerning the state of the business of his court.

On the third day of the conference an interesting resolution was presented by William Clarke Mason, past president of the Pennsylvania Bar Association, to make the federal declaratory judgment law applicable to criminal anti-trust proceedings under the Sherman Act. A committee was appointed to consider his proposal and report back to the meeting next year.

The banquet on Friday night was well attended and the address of Fletcher Pratt, well known military and naval expert, on "The Naval War in the Pacific" was well received. The meeting was attended by federal judges, United States attorneys, and lawyers of the circuit who became members of the Conference by invitation.

Fourth Circuit Judicial Conference

JUDGE John J. Parker's Fourth Circuit Conference returned once more to the Grove Park Inn on June 20, 21 and 22, the fourteenth annual Asheville meeting of federal judges, United States attorneys, and distinguished lawyers of the circuit. Despite the times and the fact, as someone remarked, that wartime travel is the most uncomfortable distance between two points, there was a full attendance of both lawyers and judges and the regional conference of United States attorneys, held at the same time, was likewise favored.

The executive session of judges held the first day was attended by Chief Justice D. Lawrence Groner of the United States Court of Appeals for the District of Columbia, Senior Circuit Judge Orie L. Phillips of the Tenth Circuit Court of Appeals, and Assistant Director Elmore Whitehurst of the Administrative Office of the United States Courts, and was addressed by Honorable Joseph W. Sanford, Warden of the United States Penitentiary at Atlanta, Georgia, on the subject of "Relationship of the Court and the Institution."

At the first open session on the following day, Judge Parker, presiding, introduced Chief Justice Harlan F. Stone, of the United States Supreme Court, who spoke on the business of that Court. He was followed by Attorney General Francis Biddle and Honorable Manley O. Hudson, judge of the Permanent Court of International Justice. The latter's exposition of the proposal to build a permanent peace around the firm foundation of international law was followed with great interest by those present.

In the afternoon the Conference settled down to work, after a moving tribute to the late Judge Luther B. Way by a committee of the Bar of his district. Lieutenant Commander James J. Robinson, reporter of the Supreme Court's Advisory Committee on Rules of Criminal Procedure, commented on the principal changes which the Committee had made at its last meeting and the discussion of the rules was led by As-

sistant Attorney General Tom C. Clark, of the Criminal Division of the Department of Justice, who was followed by a number of the leading lawyers of the circuit.

The annual dinner was a great success, with speeches by Assistant Attorney General James P. McGranary and the most newly appointed member of the federal bench of the circuit, Honorable Sterling Hutcheson, United States District Judge for the Eastern District of Virginia. The high point of the occasion was the address of United States District Judge Isaac M. Meekins, of the Eastern District of North Carolina, who mingled humor and eloquence in a most pleasing and effective way. He paid a well deserved tribute to Judges H. H. Watkins and E. Y. Webb, who this year are rounding out twenty-five years of service on the District Bench.

The last morning of the meeting was given over principally to a discussion of pre-trial procedure led by Will Shafroth, of the Administrative Office of the United States Courts, and participated in by Assistant Attorney General Francis M. Shea, of the Department of Justice, Judge Johnson J. Hayes, of the Middle District of North Carolina, Judge J. Waties Waring, of the Eastern District of South Carolina, Robert S. Spillman, of Charleston, West Virginia, and K. C. Ramsey, of Salisbury, North Carolina.

A number of committee reports followed this symposium and the afternoon session was devoted to further discussion of the criminal rules.

More than a hundred lawyers and judges answered the roll call at the opening session. The popularity of this Conference with the Bar of the circuit and with the federal judges, as well as with the ladies whose attendance adds very materially to its pleasure, is an eloquent testimonial of the efficiency with which it is organized and conducted.

JUNIOR BAR NOTES

By HUBERT D. HENRY
Secretary, Junior Bar Conference

PLANS for the eleventh annual meeting of the Junior Bar Conference, to be held in Chicago in September, are being completed very rapidly. Headquarters of the Junior Bar Conference will be the Stevens Hotel, and all junior bar men and women will be quartered there, so far as this is possible. All junior bar members expecting to attend the annual meeting should make reservations now through American Bar Association headquarters, specifying the Stevens.

The opening session of the Conference will be the fifth annual meeting of Delegates from Affiliated State and Local Junior Bar Groups and State Chairmen. This meeting will be held Sunday morning, September 10. Each state junior bar organization affiliated with the Conference is entitled to send four delegates to this meeting, and each local junior bar group affiliated with the Conference is entitled to two delegates. The credential reports should be returned to the Conference secretary as soon as possible. This meeting includes also all state chairmen and official personnel of the Junior Bar Conference. At the present time it is planned to have three panel discussions, participated in by well known junior bar leaders, upon the subjects, (1) the national program of the Junior Bar, (2) integration of the programs of the national, state and local junior bar organizations, and (3) the 1944-1945 program of the Junior Bar. With the possibility of the conclusion of a major part of the war activities in the year 1944-1945, it becomes incumbent upon the leaders of the junior bar groups to prepare full programs of activity to be commenced as soon as opportunities allow. This meeting is being so arranged that, by the interchange of ideas regarding junior bar programs, all junior bar organizations can now lay plans for full programs.

The open meetings for the full membership of the Junior Bar Conference will be held on Sunday afternoon, and on Tuesday morning, September 12. Prominent national speakers are being invited to address these sessions, and the complete list of speakers will appear in the final program. The chairmen of all committees will present their reports of activity during the past year, and the program of the Conference for the year 1944-1945 will be formulated. At the Tuesday morning session resolutions will be considered, and the presentation of the Awards of Merit will be made. Following the Tuesday session, officers and councilmen for the year will be elected.

On Tuesday afternoon, the Junior Bar Conference will hold a joint program with the Section of Judicial Administration on the improvement of the administration of justice in traffic courts. The participants in this program will be persons of national repute in the field of traffic courts and traffic court conferences.

This year the Junior Bar Conference is again offering awards of merit for outstanding work among state and local junior bar groups affiliated with the Junior Bar Conference. Awards will be given to the outstanding state group in general bar association activity, in war work, and in promoting the improvement of the administration of justice in traffic courts. One award will be given in each of the first two subjects, and in the latter subject two awards will be given, one to a large organization and one to a small organization. Identical awards will also be offered to local junior bar groups affiliated with the Conference. Appli-

cations of state and local junior bar organizations desiring to be considered in connection with the awards should be forwarded to the secretary of the Conference, and should contain in detail a list of the activities of the organization since August, 1943. Each application will be considered as an application for all awards.

All state chairmen have been asked to submit their reports of activities within their states by August 15. The report is to be sent to the councilman for the district, and a copy should be forwarded to the chairman and secretary of the Junior Bar Conference. The councilmen and the committee chairmen have been asked to submit their reports by August 20. The executive council will meet on Saturday, September 9, for the consideration of these reports and will make its recommendations to the Conference. All committee chairmen have been requested to be present at the council meeting and present their reports in person. The new executive council will meet with the new officers of the Conference on Wednesday, September 13, to map out the appointments and program for the coming year.

The Younger Members Section of the Illinois State Bar Association and the Younger Members Committee of the Chicago Bar Association are again hosts to the meeting.

The armed services have called two more state chairmen of the Junior Bar Conference. B. Hudson Milner, Kentucky, has been commissioned in the U. S. Naval Reserve and R. Frederick Sinkbeil, Alaska, is in the Army. Appointments to fill these vacancies have not been made.

The Junior Bar Section of the Florida State Bar Association has selected Seldon F. Waldo, of Gainesville, president to succeed Julius F. Parker. Perry Nichols of Miami is the new vice president and Leo Foster is secretary. Harold R. Prowell, Harrisburg, is the new chairman of the Junior Bar Conference of the Pennsylvania Bar Association to succeed Paul Kern Hirsch, now in military service. William E. Taylor is vice chairman and E. Elizabeth Lutz, secretary. Fred Much, of Houston, is the new president, and Leon C. Levy, of Houston, the new secretary-treasurer of the State Junior Bar of Texas. The new officers of the Junior Bar Section of the Iowa State Bar Association are William F. McFarlin, Des Moines, president; Walter Willet, Tama, vice president; and John Budd, Atlantic, secretary-treasurer. The new officers of the Junior Association of the Milwaukee Bar are Webster Woodmansee, president, Leslie A. Wortley, vice president, Eldred Dede, secretary, and Alfred Rozran, treasurer.

NOTICE TO MEMBERS OF JUNIOR BAR CONFERENCE

NOTICE is hereby given that at the annual meeting of the Junior Bar Conference to be held in Chicago, beginning September 10, 1944, there will be elected a chairman, vice chairman, and secretary, each for a term of one year, a member of the Executive Council from each of the Second, Fourth, Sixth, Eighth and Tenth Judicial Circuits, each for a term of two years, and from the Third and Ninth Judicial Circuits, to fill vacancies, each for a term of one year.

Pursuant to Section 4 (B) of Article IV of the By-Laws, notice is hereby given that the members of the Junior Bar Conference residing in the above-named Judicial Circuits (hereinafter referred to as Council Districts) may nominate candidates for the office of member of the Council from their respective districts by written petition, in each case, specifying the name of the person nominated and the office for which nominated, containing the names of at least twenty endorsers, all of whom are residents of the district of the person nominated. The petition can state briefly a biographical sketch of the background and qualifications of the candidate. It shall be submitted to the chairman, James P. Economos, 1140 N. Dearborn St., Chicago 10, Illinois, not later than August 26, 1944. At the first session of the annual meeting the chairman of the Conference shall deliver to the chairman of the Nominating Committee all petitions submitted pursuant to this notice.

The Nominating Committee shall consider the candidates proposed by each of said petitions, as well as receive names of other candidates and report its Council nominees at the same time and place, and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following the report of the Nominating Committee, as may other nominations also be made for officers. The election of the Council members shall take place at the same time and place, and in the same manner as the election of officers, immediately following the conclusion of the second general session of the annual meeting, and shall be by written ballot.

TERM OF OFFICE: The term of office of the officers and the Council members from the Third and Ninth Judicial Circuits elected at the Chicago annual meeting shall begin with the adjournment of the said annual meeting and end with the adjournment of the annual meeting to be held in 1945, or until their successors shall be elected and qualify, and the term of office of the Council members from the Second, Fourth, Sixth, Eighth and Tenth Judicial Circuits shall begin with the adjournment of the 1944 annual meeting and end with the adjournment of the annual meeting to be held in 1946, or until their successors shall be elected and qualify.

ELIGIBILITY: No person shall be elected as an officer or member of the Council if he will, during his term of office, become ineligible for membership in the Conference. The membership of a member of the Conference shall terminate at the conclusion of the annual meeting in the calendar year within which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. A person elected as a member of the Council shall be, at the time of his nomination, a resident of the Council District for which he is chosen. No person shall be eligible for election as a member of the Executive Council if he is then a member of the Council and has been such a member for a period of three years or more.

HUBERT D. HENRY, Secretary
Junior Bar Conference of the
American Bar Association.

THE McCARRAN-SUMNERS ADMINISTRATIVE PROCEDURE BILL, S. 2030 AND H.R. 5081, 78TH CONG., 2D SESS.

INTRODUCTION in Congress of the American Bar Association's bill to improve the administration of justice by prescribing fair administrative procedure marks not merely the culmination of more than five years of continuous study, but the commencement of a new responsibility upon Association members to promote the enactment of the measure into law. Many state and local bar associations have adopted resolutions approving the bill and urging its enactment. Members of the Association will want to participate actively in the work of creating wide understanding of the need for such legislation and the nature of this constructive effort to supply it. The following synopsis of the purposes and scope of the measure should be of help in the numerous ways in which the individual member may respond to President Henderson's appeal to "constitute yourself a committee of one to do what you can to aid in securing favorable consideration of the Association's immediate objective—the improvement of the administration of justice through the adoption of a statutory framework of fair administrative procedure."

Purposes.—The measure as introduced in Congress is designed to achieve four essential and simple purposes:

1. It requires administrative agencies to publish their organizations and procedures, and to make available to public inspection their orders and releases.
2. As to rule making, it requires that agencies publish notice and at least permit interested parties to submit views or data for consideration.
3. As to adjudication, it provides that, in the absence of agreement through informal methods, agencies must accord the parties notice, hearing, and decision before responsible officers, with provision for the segregation of deciding and prosecuting functions.
4. As to judicial review, it provides forms of review actions for the determination of all questions of law in all matters not expressly committed to executive discretion.

These four basic purposes are accomplished by eleven sections, some of which have as many as eight subsections. Section 1 defines agency, rule making, and adjudication. Section 2 requires the publication or public availability of organizations, procedures, and orders. Section 3 prescribes the notice and procedure required as to rule making. Section 4 does the same as to adjudication of particular cases. Section 5 contains provisions respecting investigations, rights of appearance, subpoenas, etc., which may be ancillary to either rule making or adjudication. Section 6 provides the requirements of a hearing applicable in all cases in which Congress has by statute required a hearing, and section 7 provides the mechanics for decision in such cases. Section 8 deals with administrative sanctions or relief, with particular provision for the exercise of the licensing power. Section 9 outlines judicial review. Section 10 requires the segregation of prosecuting and deciding functions. Section 11 contains provisions as to effective date and the construction of the proposal.

Scope.—The measure is of course limited to administrative agencies and judicial review of their regulatory actions. It applies to functions rather than to agencies and deals comprehensively with (1) the issuance of general regulations having the effect of law and (2) the adjudication of particular cases. These are the two typical administrative functions which bear upon private rights and parties. Section 1, therefore, contains definitions only as to "agency," "rule making," and "adjudication."

However, the measure is further limited, even as to these two functions. War agencies and functions are excluded in toto, except as to the requirement that they publish their procedures and make their orders available to public inspection (Section 1) which in turn is not mandatory as to military and diplomatic functions (Section 2). The requirements of notice and opportunity for the submission of views in rule making are similarly not mandatory as to naval or diplomatic functions, nor do they apply to the making of interpretative rules, general statements of policy, rules of agency organization or administrative procedure, or in situations in which notice and such procedure is impracticable, because of unavoidable lack of time or other emergency (Section 3). Adjudication procedures are inapplicable in situations in which Congress has not by statute required an administrative hearing, or where the agency is composed of representatives of the parties, or if the matter is subject to a subsequent trial of the law and facts de novo (Section 4). These exemptions from rule making and adjudication procedures apply to the provisions as to hearings and decisions (Sections 6 and 7), and to those respecting the segregation of prosecuting functions (Section 10). With reference to the safeguards imposed in connection with licenses, the time limit for administrative action is not applicable to financial reorganization cases and notice of noncompliance with licensing requirements is not mandatory in cases of willfulness or where public health, morals, or safety requires otherwise (Section 8 (b)). The judicial review provisions are not applicable to cases subject to a subsequent trial de novo or judicial review in any legislative court such as the Tax or Patent courts (Section 9), or to action which

is not final and for which there is some other adequate judicial remedy (Section 9(d)). Finally, it is specifically provided that additional requirements of law as to rule making (Section 3), adjudication (Section 4), penalties and benefits (Section 8), judicial review (Section 9(h)), or any other provision of the measure as a whole (Section 11) are not limited or repealed.

The limited scope of the proposal—meaning its limitation generally to the two basic types of administrative action—is a chief characteristic of the measure, because thereby problems of application are eliminated and the provisions of the measure may be drawn with precision. The further functional exceptions, most of which have been explained in the comments heretofore published, reduce and concentrate the requirements imposed. These things have been done in order to reach essentials and obviate the non-essentials.

Effect.—This bill gathers the random threads of precedent for the information and protection of private parties. The framework of fair procedure so devised will at the same time enable administrative agencies to master the great difficulty pointed out in the Federalist: "You must first enable the Government to control the governed, and in the next place oblige it to control itself." The subject provides the most fertile ground for statesmanship in the field of the administration of justice since the Judiciary Act of 1789.

WAR NOTES

By TAPPAN GREGORY

Of the Chicago Bar

IN a case before the Circuit Court of Appeals for the Eighth Circuit, it is held that the proceedings and judgment of a military tribunal, properly constituted and having jurisdiction, will not be reviewed by a civilian court, and are only subject to review by the Board of Review of the Office of the Judge Advocate General of the United States Army.

Application was made in New York under the Civil Practice Act to compel the sheriff of the City of New York to accept and execute a warrant providing for the arrest and incarceration of the defendant, an officer in the United States Navy, for failure to make alimony payments. The Supreme Court, Special Term, New York County, held that the sheriff was correct in refusing to accept and execute the warrant in view of the provisions of the Soldiers' and Sailors' Civil Relief Acts, state and federal.

The volume of work done by the organized Bar in assisting service men is indicated to some extent by the reports of a few committees. For example, at the spring meeting of the Ohio State Bar Association, Hugh K. Martin of Columbus reported that the Columbus Bar Association committee had rendered legal assistance to men in the armed forces and their families in more than 2,500 cases.

The chairman of the War Work Committee of the State Bar of Texas says, "Some idea of the volume may be gathered from the fact that one committeeman in an average location handled 269 items earlier in the year, prior to his own entrance in service."

The Committee on War Work of the Florida State Bar Association reports through its chairman that "not less than 6,000 items have been handled by the committee and its representatives in the current bar association year."

In Pennsylvania several thousand requests for legal assistance were received from servicemen.

Between January and June of 1944 the state committee in New Jersey has received requests for assistance in matrimonial difficulties from some 300 New Jersey servicemen. The committee, of course, has handled many other sorts of legal problems.

In Delaware, the War Work Committee has been taking care of anywhere from four to thirty matters a day.

The Subcommittee on Legal Aid of the War Committee of the Bar of the City of New York estimates that it has handled 1,500 cases during the second year of its work.

There is so much of general interest in the report of January 15, 1944, of the Committee on War Work of the New Jersey State Bar Association, that we quote from it extensively:

> The principal object of the Committee on War Work is to enlist the aid of the Bar as a whole, as well as its individual members, in work on the home front in support of the battle front. Primarily its function is to see to it that no serviceman is prejudiced to his legal rights by his service to his country. This involves protecting the serviceman's rights against injury from litigation during his absence in service, helping him execute powers of attorney and wills necessary for his protection because of his service, and doing much other work needed for the same reason. As far as litigation is concerned, the overwhelming call for aid from our servicemen today comes in regard to matrimonial actions.
>
> (1) *Two New Divorce Applications Every Day.* Were your committee running a divorce mill, its wheels would indeed be kept busy. Doubtless a word of explanation is needed as to this influx of apparent evidence of matrimonial infidelity in New Jersey.
>
> In the first place the facts are not as somber as they appear. This will be clear from the typical case presented to our committee for its aid. (1) Ten years ago John Smith married Betty Jones. They married in haste, and repented—apart—at leisure. For years they have not seen each other, and Betty has been supporting herself. Along comes the war, and with it Congress enacts the Servicemen's Dependents Allowance Act of 1942, which en-

titles a soldier's or sailor's wife to a dependency allowance, regardless of whether or not she is dependent upon him in fact, or has long since been separately paddling her own canoe. This allowance, is paid, in part by our fatherly Government, in part, taken from the man's own munificent pay of $50 a month. Small wonder that John Smith objects to his pay being taken, even partially, to support the woman from whom he has been amiably separated for years, but whom he has been forced to designate as his wife on signing his army papers. Small wonder, on hearing that the Bar Association has established war work committees and delegated lawyers to volunteer their services at the legal assistance offices established at every army and navy station, that he immediately turns for aid to the War Work Committee, particularly as he gains the impression that these legal services are free.

The above facts are typical of literally hundreds of cases that have pressed your War Work Committee for aid. But of course they do not represent the rarer cases (2) of the soldier or sailor who has been at the front in either Naples or New Guinea, and who has just received word from his home that, as to his wife, "absence makes the heart grow fonder" of the other fellow. Nor of course are either of these two cases representative of the soldier, recently heard from, who has not heard from his wife for all of "three weeks" and therefore felt that we should aid him in obtaining a divorce.

Obviously these three applications for aid each call for different treatment. To determine the proper treatment, your Committee therefore had to resort to general principles. These, as stated, are primarily, that no serviceman shall be prejudiced in his legal rights by his service to his country. Hence, where litigation is instituted against the serviceman, either matrimonial or otherwise, it is your Committee's duty to protect him in such litigation by obtaining a stay therein under the provisions of the Soldiers' and Sailors' Civil Relief Act, or if unsuccessful, defending same for him on the merits, upon the assumption that his rights can not be properly protected due to his absence in service. On the other hand, where in divorce proceedings the serviceman desires to institute litigation on his own behalf, the criterion is, whether or not his legal rights are prejudiced due to his service to his country. Hence, in case (1) above, where the man and wife have been amiably separated for years before the war, it is not the war which has prejudiced his rights, but his failure, previous to the war to protect his own separate status. Had he done so, his pay would not now be subject to the present deduction for his independent wife.

As to case (2), the infidelity of his wife has doubtless here been due in part to his separation from her in his country's service. Here the war work committee should take action promptly. It does. Immediately upon the receipt of such a communication, it forwards the information to the chairman of the War Work Committee of the bar association in the locality where the legal proceedings should be instituted, for such chairman to obtain the aid of a local lawyer, together with a copy of its mimeographed instructions, a copy of which is attached hereto, as to what the course of the proceedings should be. At the same time a copy of these instructions, with such forwarding letter, is in turn sent to the serviceman himself.

In this simple fashion your Committee has, during the past year, handled literally hundreds of these matrimonial proceedings. It should be added that the above procedure has been approved by the General Council of the New Jersey State Bar Association. But of course the advices of the Association itself thereon would be most welcome.

You will of course ask why the above injustice in the Servicemen's Dependents Allowance Act is continued. This question your Committee has already asked of Brigadier General Gilbert, the Director of the Office of Dependency Benefits, which handles every one of the millions of cases existing in the Army. And this question was also considered in the first instance by the Congress itself before the Act was passed. The difficulty with changing the law, to make dependency in fact a prerequisite to the payment of the dependency benefits, so far as a wife is concerned, is a very practical one. As General Gilbert writes "to make a determination (of dependency or misconduct of the wife) in such cases would place this office in the undesirable and unenviable position of a huge domestic relations court where all cases must of necessity be decided *in absentia* of all parties . . . . It is believed that the recourse of a soldier in such cases is to be found in the courts rather than within the administration of the law."

(2) *Wills and Powers of Attorney.* In addition to the above, there have been a large number of applications to your Committee for aid along other lines too various to enumerate. We would call attention to the fact, however, that the Committee has labored long and hard in the preparation of a form of power of attorney, which is aimed to cover the prime needs of the average soldier and sailor, as well as to meet with the requirements of both the New Jersey and federal law, including the new Power of Attorney Act recently enacted by our Legislature (N. J. S. A. 4 6:2, B-1).

In regard to this, your committee would request renewal of the authority granted last year, to obtain the amendment of the Act, so that same may apply, not only to those in the armed services, but to those about to be inducted therein.

In addition your Committee has similarly prepared a simple form of will. Both this form of will and power of attorney itself have been distributed in quantity to every army cantonment and naval station throughout the state, as well as to every War Work Committee of every local and county bar association throughout the state. This should largely meet the needs of every New Jersey soldier and sailor, to put his home in order, e'er he sets forth in our defense.

At the January term, 1944, of the Supreme Court of Pennsylvania, Eastern District, Judge Allen M. Stearne rendered an opinion in the matter of *In re Estate of Joseph Buehrer,* deceased, in the appeal of Walter Knight from refusal of the Orphans' Court of Delaware County to probate nuncupative will. It appeared from the opinion that the decedent and the witness Carter were firemen on an oil tanker. Carter testified that the decedent talked to him frequently about what he wanted to have happen to his property in the event that he was lost at sea. On the last voyage on which they were together, Carter quoted the decendent as saying, "Well, if I get lost or anything—I want Mr. Knight and his people to have what I got, insurance and everything." The Court held that under the Wills Act the words spoken did not constitute a valid mariner's will because the decedent did not utter them with the intention that they constitute his will. The decree was accordingly affirmed and the appeal dismissed.

TAX NOTES

THE extent to which legal fees may be available as a deduction to the individual taxpayer has been considered in two recent Circuit Court cases. In *Helvering* v. *Stormfeltz* (CCA-3, June 3, 1944) the court held that only that part of the expenses of litigation and attorney's fees which were attributable to the recovery of interest could be deducted under Sec. 23 (a) (2) of the Code where the taxpayer had sued his former guardian for the recovery of amounts alleged to have been embezzled or converted by the guardian. This was a reversal of the Tax Court's decision which had allowed deduction of the full amount. *Higgins* v. *Commissioner* (CCA-1, June 30, 1944) concerned the deductibility of fees paid an attorney for legal advice relating to various tax questions, including advice as to the tax consequences of gains and losses on sales and the preparation of state and federal tax returns. The court held that the provision in the Regulations denying a deduction for such expenditures was a proper construction of Sec. 23 (a) (2).

Income Tax—Ross Essay Prize

The 1939 recipient of the Ross Essay Prize, a cash award made from a trust under the will of Erskine M. Ross and administered by the American Bar Association, was held to have received not a gift from the American Bar Association but income from a trust upon which he was taxable as a beneficiary. *Malcolm McDermott*, T. C., June 1, 1944.

Depreciation—Deduction by Beneficiary

A trust held improved real estate acquired pursuant to mortgage foreclosures. Under New York law no income from the properties could be distributed to the beneficiary until the "mortgage salvage operations" were completed by sale of the properties at which time an allocation of the proceeds between income and principal of the trust would be made. The Circuit Court of Appeals, Second Circuit, holds that the trust beneficiary was nevertheless entitled currently to deduct depreciation on the properties from her gross income. *Commissioner* v. *Gutman*, CCA-2, May 26, 1944.

Estate Tax—Savings Bank Account

A decedent during his lifetime opened savings bank accounts for each of his children, naming himself and his wife as trustees, with the money in the accounts subject to withdrawal by the trustees during their lifetime. The Circuit Court of Appeals, Seventh Circuit, holds in *Estate of Helfrich* v. *Commissioner*, CCA-7, June 2, 1944, that while the trusts were valid and irrevocable trusts under local law, nevertheless the fact that the decedent retained the power during his life to use the funds for the children's support required the inclusion of the trust funds in his gross estate.

Employees' Trusts

A "rule of thumb" has been adopted by the Bureau to determine whether a plan is for the benefit of "employees", where some of the covered employees are also stockholders. Generally, the maximum percentage of the total annual contribution which may be contributed on behalf of stockholder-employees is 30%. For this purpose, only those stockholders are considered who own 10% or more of the stock, but this percentage takes into account stock owned by a spouse or child. I.T. 3674, I.T. 3675, I.T. 3676.

A profit-sharing plan must set forth a definite formula for contribution and distribution. Contributions may be based upon a specified percentage of annual profits in excess of dividend commitments plus a fixed amount. Distributions may be provided for in proportion to basic compensation. I.T. 3661, I.R.B. 1944-10-11737. Deduction is allowed only under the pension trust provision, however, whenever the plan provides for pre-determined benefits, such as an annual benefit of a percentage of salary or of a percentage of salary for each year of service, or a single payment equal to one year's salary. I.T. 3660, I.R.B. 1944-10-11736.

Earnings or Profits—Redemption of Stock

In a recent case the Ninth Circuit held that the redemption of preferred stock by an apparently solvent corporation at less than the original subscription price does not result in any addition to earnings or profits and, accordingly, a later distribution of the amounts "saved" by such redemption to the common stockholders was merely a return of capital. The Tax Court had held to the contrary. *United National Corporation* v. *Com'r.* (C.C.A. 9, June 15, 1944).

Taxpayer Not Bound by His Own Records

In a noteworthy disregard of the Supreme Court's dictum in *Higgins* v. *Smith*, 308 U. S. 473, the Sixth Circuit has held that the taxpayer has the same right as the government to ignore a "paper" transaction. Taxpayer, the controlling stockholder of a corporation to which he was indebted, had the corporation enter on its books a reduction of his debt in consideration for his transfer of certain stock. The stock was never transferred, and a year later the entries were reversed. Reversing the Tax Court, the court holds that in the computation of loss upon a subsequent sale of the stock, taxpayer is entitled to use his original cost. *Thal* v. *Com'r.* (June 3, 1944).

Prepared by Committee on Publications Section of Taxation: Mark H. Johnson, Chairman, New York City, Gustave Simons, Howard O. Colgan and Martin Roeder, New York City, and Allen Gartner, Washington, D. C.

LONDON LETTER

On the 14th March, 1944, in the House of Commons, Major A. N. Braithwaite moved that "This House, desiring to promote a closer association between the British Parliament and the Congress of the United States, requests Mr. Speaker on its behalf to invite the Congress of the United States to send a delegation of its Members to visit Parliament at as early a date as may be convenient." Major Braithwaite told the House that he had been requested by the British-American Parliamentary Association, whilst he was in Washington in November 1943, to ascertain whether Congress would be disposed to accept such an invitation for a delegation of their Members to visit this country as the guests of Parliament. The Chairman of the British-American Parliamentary Association, Lieut.-General Walter Elliot, wrote to Mr. Speaker Rayburn of the United States Congress concerning the proposal, and received a most cordial reply, in which he not only expressed his accord but said he thought it would be a splendid thing if representatives from the British Parliament could visit the Senate and House of Representatives of the United States. When President Roosevelt was informed of the result of the talks he wrote to Major Braithwaite expressing his pleasure, and stating that he had watched the development of fraternal relations between Congress and the British Parliament for a long period of years with deep satisfaction.

In the course of his speech Major Braithwaite stated that there was no precedent for such a motion and that the promptings that give rise to the proposals must come spontaneously from Parliament. He continued "When our American guests come to the ancient and honourable House the occasion will mark a milestone along the road of international co-operation, and this war will not have been fought in vain if it has established in both our countries a spirit of tolerance and respect and of understanding of our urgent responsibilities to mankind." After other Members of the House had given their warmest support to what had been described as "this admirable motion" the question was put and unanimously agreed to.

On the same day a similar motion was moved in the House of Lords by Lord Addison, who said "The Congress of the United States and this Parliament are the world's greatest embodiments of free institutions. They are the bastions of liberty." The motion was most heartily supported by all parties in the House, and Lord Simon, the Lord Chancellor, before putting the Resolution to the vote commented on the many levels on which our two countries had been co-operating during this war, and most particularly he referred to the co-operation we had enjoyed at the level of the comradeship of fighting men on land, on sea and in the air. The motion, as in the House of Commons was agreed to *nemine dissentiente*.

Members of the Legal Profession have a particular interest in the event. They still recall, with the utmost pleasure, the happy and lasting contacts made with their brother lawyers in the United States when a similar interchange of visits was arranged between their own representatives some years ago. There is no doubt that we are still enjoying the benefits of that occasion, and that nothing but good has followed in its wake. Even more may we look forward to the coming meetings to establish a fraternal co-operation between our two countries which, it is recognised, is absolutely essential for the benefit of mankind and the future peace of the world.

John Arthur Barratt

It is not long ago that I had occasion to refer to the death of Mr. D. Campbell Lee, who was a member of both the American Bar and the English Bar. Now the death has recently been announced of another well-known representative of the American Bar in England. Mr. J. Arthur Barratt died at Leeds on the 1st March, 1944, at the good age of eighty-six. He was called to the New York Bar in 1880, and was also a member of the United States Supreme Court Bar, practising in his mother country until nearly the close of the last century. On the first of January 1901 he was called to the English Bar at the Inner Temple, and was admitted to the Middle Temple *ad eundem* in January 1912. For some time he was Legal Advisor to the American Embassy in London, and his services were frequently in demand as an expert witness in matters concerning United States law in the Courts of this Country. He was well known also in the realm of International law, having been Vice President of the International Law Association, a member of the Grotius Society, one of the Comite Juridique International d'Aviation, and Vice President of the International Law Conferences at the Hague (1921) and Vienna (1926). He was a founder of the Pilgrims and Vice President (London Chapter) of Phi Beta Kappa. Mr. Barratt read papers at law conferences in Berlin, Portland, Me., Buda Pesth, London, Paris, Madrid and Oxford, and was the author of several books, as well as a contributor to the Encyclopaedia Britannica, The American Law Review, and the Law Quarterly Review. He was made a King's Counsel in 1923, and retired from practice shortly before the outbreak of the present war.

S.

The Temple.

ROSS ESSAY CONTEST WINNER

THE 1944 Essay Contest conducted by the American Bar Association for the $3,000 prize established pursuant to the terms of the bequest contained in the will of United States Circuit Judge Erskine M. Ross, deceased, of California, has been awarded by the Board of Governors to 1st Lt. Wayne D. Williams, Judge Advocate General's Department, United States Army, Washington, D. C.

The subject this year was, "What Instrumentality for the Administration of International Justice Will Most Effectively Promote the Establishment and Maintenance of International Law and Order?" Membership in the American Bar Association is a condition of eligibility for this competition and seventy-two members from all over the United States submitted essays this year.

Lt. Williams is 29 years old, and was born in Denver, Colorado. He was educated in the Denver public schools, and received his A.B. at the University of Denver in 1936, where he majored in Political Science and Economics. In 1938 he received his LL.B. at the Columbia University School of Law. He is a member of the Colorado and Federal bars of Denver, Colorado, and the American Bar Association, and also a member of Sigma Alpha Epsilon, Phi Delta Phi, and Omicron Delta Kappa.

Before entering military service, Lt. Williams was engaged in private practice in Denver with his father, Wayne C. Williams, who was former Attorney General of Colorado, Special Assistant to the United States Attorney General, and who is now Regional Counsel, OPA, in Denver.

While in private practice, Lt. Williams was Assistant City Attorney of Denver as general trial attorney, and instructor in Torts at the Westminster Law School of that city.

Lt. Williams has been actively interested in international law and relations, and especially in the peace problem, since college days, and studied with the Foundation for the Advancement of the Social Sciences of the University of Denver. His paper was written while he was an enlisted man in the army.

It is hoped that Lt. Williams will be able to attend the annual meeting to be held at Chicago, Illinois in September, to receive in person the Association's certificate and check.

The winning essay will be published in full in the September issue.

The first Ross Essay Prize winner was Carl McFarland, of Washington, D. C., in 1934. The successive winners were Benjamin Wham, of Chicago, 1935; George Grayson Tyler, of New York City, 1936; Elwood Hutcheson, Yakima, Washington, 1937; Albert E. Stephan, Portland, Oregon, 1938; Malcolm McDermott, Durham, North Carolina, 1939; Thomas Fitzgerald Green, Jr., Athens, Georgia, 1940; Willard Bunce Cowles, Washington, D. C., 1941; Frank E. Cooper, Detroit, Michigan, 1942, and Lester Bernhardt Orfield, Kansas City, Missouri, 1943.

Resolution Adopted by State Bar of Texas at 1944 Annual Meeting, Fort Worth, Texas

RESOLVED by the State Bar of Texas:

1. That the Supreme Court of the United States is losing, if it has not already lost, the high esteem in which it has been held by the people, an esteem created by their belief that it had always remained free of political, personal and unworthy motives, and had interpreted and declared the law as it is written, according to tradition and precedent, and agreeable to the provisions of the Constitution and the Bill of Rights.

2. Lately it has repeatedly overruled decisions, precedents and landmarks of the law, of long standing, without assigning any valid reason therefor, dismissing the question with a wave of the hand, and contenting itself with the assertion that these precedents have been eroded by the processes of the years; or basing its decision on casuistry and sophistry rather than logic. An example of this is found in decisions of the Court by which jurisdiction is held under the Interstate Commerce Clause of the Constitution.

3. We do not believe that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would abandon or substantially impair the rule of stare decisis. Unless the assumption is substantially true that cases will be disposed of by application of known principles and previously disclosed courses of reasoning, our common law process would become the most intolerable kind of ex post facto judicial lawmaking.

4. By plainly disregarding these principles and these processes, and by its vacillations and uncertainties, and the inconsistencies of its decisions, it has rendered it impossible for the practicing lawyer to advise his client as to what the law is today, or even to offer a guess as to what it will be tomorrow. And by this conduct and by controversies within its own personnel, it has subjected itself to the suspicion, widely held, that it speaks, or undertakes to speak, in the voice of the appointing power, rather than the voice of the law, as witness the following from a writer, well known and widely read:

> Mr. Roosevelt's appointees to the Supreme Court have just ruled that all insurance is under federal control. To do so they have reversed previous

decisions that had stood for a hundred years.

And this from the Houston *Post*, widely circulated and respected throughout the country:

> When the United States Supreme Court doffs its black robes Monday, and leaves on vacation, it will go with less popular admiration and respect than any previous Supreme Court has enjoyed within the memory of living men.
>
> In this body of jurists the majesty and the dignity and the prestige of the nation's highest tribunal has hit an all-time low.

Such expressions are confined to no section of the country; they are general, and they represent a general sentiment. They show that the Court as an institution has suffered a serious injury at the hands of a majority of its members as presently constituted, and the protests of those members not concurring present an arraignment as strong as those quoted above, and scarcely less restrained.

5. The American Bar cannot ignore these conditions, or the causes which produce them, without failing in their own obligations, as lawyers. It is their duty, frankly and courageously, to call them to the attention of the Court, and to demand a return to the application of known principles and previously disclosed courses of reasoning, so that the country may be delivered from the most intolerable kind of ex post facto judicial law-making. To that end we direct that a copy of this resolution be forwarded to the Clerk of the Supreme Court, with request that it be called to the attention of the Chief Justice.

BAR ASSOCIATION NEWS

Georgia Bar Association

THE Georgia Bar Association met for its 61st annual meeting in Atlanta, Georgia, on May 31 and June 1. On account of war conditions, the meeting was streamlined and the program was condensed. The session lasted only a day and a half.

On the first day of the session, Hon. Marvin A. Allison of Lawrenceville delivered his presidential address on the subject "Today's Challenge to the Bar." This was followed by an address by Honorable Sam Rayburn of Texas, Speaker of the House of Representatives of the United States. During the afternoon session, addresses were delivered by Governor Ellis Arnall of Georgia, Frank C. Gross of Toccoa, president of the Georgia State Senate, Hon. Roy V. Harris of Augusta, speaker of the Georgia House of Representatives, Miss Daphne Robert of Atlanta, president of the National Association of Women Lawyers, and Lt. Col. Henry C. Urquhart, J.A.G.D., Staff Judge Advocate, Warner Robins Air Service Command, Robins Field, Georgia.

CHARLES J. BLOCH
President, Georgia Bar Association

At the annual banquet of the Association, Honorable R. C. Bell, Chief Justice of the Supreme Court of Georgia, acted as toastmaster. Honorable Alben W. Barkley of Kentucky, majority leader of the United States Senate, delivered the principal address at the banquet. His subject was "War and the Constitution."

On the morning of June 1, the business session of the Association was held. Committee reports were received and discussed on the floor

of the convention. At the conclusion of the session the following officers were elected for 1944-1945: Charles J. Bloch, Macon, president; Charles L. Gowen, Brunswick, vice president; J. Wilson Parker, Atlanta, treasurer; R. Lanier Anderson, Jr., Macon, secretary, and John L. Tye, Jr., Atlanta, Delegate to the American Bar Association.

R. LANIER ANDERSON, JR.,
Secretary

Illinois State Bar Association

THE sixty-eighth annual meeting of the Illinois State Bar Association, held at Danville on June 14, presented a wartime conference type of program devoted to discussion of present and post-war organized bar activities in the State of Illinois. President Warren B. Buckley, Chicago, presided throughout the meeting.

Discussion of the post-war problems of the organized bar was capably presented by a panel composed of Vice President Kaywin Kennedy, Bloomington; Dean Albert J. Harno, Urbana, chairman of the American Bar Association Section on Legal Education; John S. Miller, Chicago; and George S. McGaughey, Waukegan. The convention authorized appointment of a special committee to plan the work of the Association in meeting the problems of return of lawyers to active practice and the re-establishment of the law schools in the post-war period.

During the convention, the Association received certificates of appreciation for its aid to the Army and Navy legal assistance programs, with Commander Richard Bentley presenting the certificates on behalf of the Secretary of the Navy, and Major George H. Leonard, Jr., representing the Secretary of War.

Officers elected for the coming year included: Henry C. Warner, Dixon, president; Tappan Gregory, Chicago, Kaywin Kennedy, Bloomington, and William M. James, Chicago, vice

HENRY C. WARNER
President, Illinois State Bar Association

presidents; B. F. Langworthy, Chicago, secretary; and A. C. Margrave, Springfield, treasurer.

Also elected at this time were the Illinois State Bar Association delegates to the American Bar Association House of Delegates, for the term expiring in 1946, as follows: Warren B. Buckley, Chicago; Albert J. Harno, Urbana; and Henry C. Warner, Dixon.

B. F. LANGWORTHY,
Secretary

Pennsylvania Bar Association

THE 49th annual meeting of the Pennsylvania Bar Association was held at Atlantic City, June 22, 23 and 24, 1944.

President Wm. Clarke Mason, in opening the meeting, challenged the lawyers of the Commonwealth to sponsor the teaching of constitutional law and government to a presently confused mass of their fellow citizens. President Mason reduced this challenge to a definite concrete proposal whereby individual lawyers would assume the task of forming

J. PAUL MacELREE
President, Pennsylvania
Bar Association

discussion groups of citizens in their community unit. Thus, it would be possible by personal contact, discussion and group thinking to demonstrate how the constitutional protections have been destroyed and to warn of the dangers ahead. These groups could enlarge in scope and unite with similarly minded groups and could re-build respect for and rededicate the people of this United States to those ideals which caused the Declaration of Independence and the promulgation of the Bill of Rights.

Notwithstanding the war conditions this voluntary bar association showed a net gain in membership during the current year. Five hundred and forty-nine members are now serving in the armed forces and their dues are of course remitted.

An outstanding feature of the meeting was the presentation of Awards of Appreciation by the War and Navy Departments to the Association. Chairman Walter B. Gibbons of the Committee on War Work outlined the work being done by the Bar in cooperation with the Legal Assistance Officers of the Army, Navy, Marine Corps and Coast Guard. The Certificate of the War Department was presented by Lt. Col. Milton J. Blake, J.A.G.D., and the Certificate of the Navy Department was presented by Commander Richard N. Bentley, U.S.N.R.

The Association recommended the enactment of legislation to set up a Legislative Commission to reexamine and recodify the law of decedents' estates and trusts in the light of experience since 1917.

Chairman Andrew Hourigan of the Committee on Judicial Selection and Tenure presented to the association Jacob M. Lashly, former president of the American Bar Association. Mr. Lashly discussed at some length the so-called Missouri Plan for the selection of judges. This "Plan" by reason of a vote in the Constitutional Convention of Missouri on June 7, 1944 has now become the Missouri "System." Much interest was indicated in the subject and the committee studying it will report at the mid-winter meeting of the Association.

An interesting panel discussion was conducted by the Committee on Labor and Industry under the leadership of Lt. Col. Wm. S. Culbertson. The subject of the discussion was, "Post War Labor and Industry Arbitration." Representatives of labor, management and public engaged in the discussion.

At the annual dinner of the Association, Honorable George Wharton Pepper, President of the American Law Institute, spoke on the Bar of Pennsylvania.

J. Paul MacElree of West Chester, Pennsylvania, was elected president of the Association and John G. Buchanan of Pittsburgh was elected vice president.

Colonel John McI. Smith was re-elected secretary, Fidelity-Philadelphia Trust Company of Philadelphia was re-elected treasurer and Mrs. Barbara Lutz, Harrisburg, as executive secretary of the Association.

JOHN McI. SMITH,
Secretary

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